APPENDIX TO WYOMING BRIEF IN OPPOSITION TO MOTION TO AMEND PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF.

Supreme Court, U.S.
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In The Supreme Court
Of The United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,
v.
STATE OF WYOMING,
Defendant.

MOTION OF THE STATE OF WYOMING FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT OF MOTION

JOSEPH B. MEYER
Attorney General
of Wyoming

DENNIS C. COOK
Senior Assistant
Attorney General
Counsel of Record

JENNIFER HAGER
Assistant
Attorney General

123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

RAPHAEL J. MOSES
CHARLES N. WOODRUFF
JAMES R. MONTGOMERY
Special Assistant
Attorneys General

MOSES, WITTEMYER,
HARRISON AND
WOODRUFF, P.C.
1002 Walnut Street
Suite 300
Boulder, Colorado 80302
(303) 443-8782

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No. 108, Original

In The Supreme Court

Of The United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

WYOMING MOTION FOR SUMMARY JUDGMENT

Defendant, State of Wyoming, hereby moves the Court pursuant to SUP. CT. R. 9.2 and FED. R. CIV. P. 56 to enter judgment for Wyoming and against Nebraska on all of the claims in Nebraska's Petition for Order Enforcing Decree and for Injunctive Relief and on part of Wyoming's counterclaim. The grounds for this motion are:

1. This is an action brought by the State of Nebraska against the State of Wyoming for enforcement of the decree in *Nebraska v. Wyoming*, 325 U.S. 665 (1945), modified, 345 U.S. 981 (1953) ("the Decree"). Nebraska alleges that Wyoming has taken and plans to take certain actions that have violated and threaten to violate the Decree. Wyoming has filed a counterclaim alleging Nebraska violations of the Decree.

2. The pleadings herein, together with the affidavits appended to this motion, show that no genuine issue of material fact exists with respect to Nebraska's claims, and that Wyoming is entitled as a matter of law to judgment denying Nebraska's Petition for an Order

Enforcing Decree and for Injunctive Relief.

3. The following facts as to the actions and proposed actions in Wyoming alleged in Nebraska's petition are the controlling facts upon which Nebraska's claims are based, and are not in dispute:

a. The operation of Grayrocks Reservoir on the Laramie River depletes the natural flow of the North Platte River. Nebraska Petition, para. 3.a.; Wyoming Answer, para. 3(a); Affidavit of Gordon W. Fassett.

b. The construction and operation of additional river pumping, diversion and storage facilities at the confluence of the Laramie and North Platte Rivers, such as the proposed Corn Creek Project, would deplete the natural flow of the North Platte River. Nebraska Petition, para. 3.b.; Wyoming Answer, para. 3(b); Affidavit of Gordon W. Fassett.

c. The construction and operation of storage reservoirs on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir, such as the proposed Deer Creek Reservoir, would deplete the natural flow of the North Platte River. Nebraska Petition, para. 3.c.; Wyoming Answer, para. 3(c); Affidavit of Gordon W. Fassett.

d. Wyoming has brought an action against the United States Bureau of Reclamation to require the Bureau to obtain Wyoming permits for diversion of North Platte waters in Wyoming to storage in the Inland Lakes in Nebraska. Nebraska Petition, para. 3.d.; Wyoming Answer, para. 3(d).

4. The question whether the actions and proposed actions in Wyoming alleged in Nebraska's petition and admitted by Wyoming in its answer violate or threaten to violate the Decree is a question of law that should be decided on summary judgment.

5. The actions and proposed actions in Wyoming alleged by Nebraska do not violate or threaten to violate the Decree, as a matter of law. Wyoming therefore is entitled to a judgment determining that such actions do not violate or threaten to violate the Decree, and denying Nebraska's Petition for an Order Enforcing Decree and for Injunctive Relief.

6. There may be disputed issues of material fact with respect to the Nebraska violations of the Decree alleged in Wyoming's counterclaim. However, the central issue of interpretation of the Decree involves no genuine issues of material fact and may be determined as a matter of law. Wyoming requests the Court pursuant to SUP. CT. R. 9.2 and FED. R. CIV. P. 56(d) to enter summary judgment for Wyoming determining that the Decree affords Nebraska no right to North Platte River water except for irrigation of lands served by canals specified in the Decree that divert at or upstream of Tri-State Dam (including the Ramshorn Canal). A ruling on that pure question of law will simplify the case and narrow the issues for trial. For example, if as Wyoming contends, Nebraska's rights under the Decree are limited to those canals diverting at or above Tri-State Dam, there will be no need for the parties to undertake discovery and technical studies of the water resources and the uses of water in the lower

North Platte and Platte River basins in Nebraska.

Wyoming therefore requests the Court to enter judgment for Wyoming on each of the claims in Nebraska's petition and on the legal issue raised by Wyoming's counterclaim. Wyoming requests the Court to enter judgment specifically determining as follows:

a. The Decree does not restrict Wyoming's use of water from the Laramie River.

b. This Court's previous ruling that Wyoming's use of water from the Laramie River is not restricted is *res judicata*. Therefore, Nebraska has no right to water from the Laramie River under the Decree or otherwise, and is barred from asserting any claim to the Laramie River here.

c. Nebraska is estopped, by reason of the Agreement of Settlement and Compromise among Nebraska, Basin Electric Power Cooperative and others, to assert that construction or operation of Grayrocks Reservoir in accordance with that agreement violates the Decree or any rights claimed by Nebraska to the Laramie River.

d. Nebraska is estopped, by reason of the ruling of the Goshen County, Wyoming, District Court in *In Re Corn Creek Irrigation District*, Civil Action No. 19-460 (Jan. 20, 1978), to assert that construction or operation of the Corn Creek Project would violate the Decree or any rights claimed by Nebraska to the Laramie River.

e. Since the Decree does not restrict Wyoming's use of water from the tributaries of the North Platte River below Pathfinder Dam, the construction and operation of Deer Creek Reservoir would not violate the Decree.

f. The Decree affirmatively exempts ordinary and usual municipal uses from any restriction. The proposed Deer Creek Reservoir would supply water for ordinary and usual municipal uses. Therefore, the construction and operation of Deer Creek Reservoir would not violate the Decree or Nebraska's apportionment provided by the Decree.

g. Wyoming's suit pending in the federal district court to require the United States Bureau of Reclamation to obtain Wyoming permits for storage of water from sources in Wyoming in the Inland Lakes in Nebraska does not violate the Decree.

h. Nebraska's Petition for an Order Enforcing Decree and for Injunctive Relief is denied.

i. Nebraska's rights under the apportionment provided by the Decree are limited to the water supplies for Nebraska lands irrigated by the canals identified in the Decree that divert at or upstream of Tri-State Dam (including the Ramshorn Canal).

Respectfully submitted,

JOSEPH B. MEYER
Attorney General of Wyoming

DENNIS C. COOK
Senior Assistant Attorney General
Counsel of Record

JENNIFER HAGER
Assistant Attorney General

123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

RAPHAEL J. MOSES
CHARLES N. WOODRUFF
JAMES R. MONTGOMERY
Special Assistant Attorneys General

MOSES, WITTEMYER, HARRISON
AND WOODRUFF, P.C.
1002 Walnut Street
Suite 300
Boulder Colorado 80302
(303) 443-8782

No. 108. Original

In The Supreme Court

Of The United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,
v.
STATE OF WYOMING,
Defandant.

AFFIDAVIT OF GORDON W. FASSETT

STATE OF WYOMING)
) ss.
COUNTY OF LARAMIE)

GORDON W. FASSETT, being first duly sworn upon oath, states as follows:

1. I am the State Engineer of the State of Wyoming. As State Engineer, I have general supervision of the waters of the State of Wyoming and of the officers connected with its distribution. Official records of water supply, water development construction permits and applications for such permits, water rights, and diversions of water for beneficial use are kept under my supervision. I became State Engineer on March 16, 1987. From March 26, 1984 through March 15, 1987, I served as Deputy State Engineer and *ex officio* secretary of the Wyoming State Board of Control. Throughout my tenure as Deputy State Engineer and State Engineer, I have had access to and familiarity with the records of the State Engineer's Office and the State Board of Control. I am familiar with the decree of

the U.S. Supreme Court apportioning the natural flows of the North Platte River in *Nebraska v. Wyoming*, 325 U.S. 665 (1945), *modified*, 345 U.S. 981 (1953) ("the North Platte Decree") and am familiar with the administration of water rights on the North Platte River under that decree.

2. A permit pursuant to Wyo. Stat. § 41-3-301 (1977) was issued on March 13, 1987, for an appropriation of surface water for Deer Creek Reservoir. Deer Creek Reservoir will be administered in priority pursuant to Wyoming law, and therefore will store primarily during surplus water years. Deer Creek Reservoir is the only significant water development project permitted for future construction on tributaries of the North Platte River between Pathfinder and Guernsey Reservoirs.

3. The United States Bureau of Reclamation obtained permits for construction of certain features of the North Platte Project pursuant to Wyoming law. Those permits do not provide for the diversion of the natural flow of the North Platte River in Wyoming to storage in the four Inland Lakes in Nebraska.

4. No permit for storage of water from sources in Wyoming in the Inland Lakes exists in the records of my office. Those records, upon examination, further show that neither the United States Bureau of Reclamation nor any other person or entity has ever applied for a permit for such storage in the Inland Lakes.

5. To this date, Wyoming has not prevented the storage of water from sources in Wyoming in the Inland Lakes. The only actions by the State of Wyoming or its officers to prevent storage in the Inland

Lakes without a Wyoming permit are the filing of the lawsuit against the United States Bureau of Reclamation and others in the District Court in Goshen County, Wyoming (Civil Action No. 23-13), and discussions and correspondence with the Bureau of Reclamation leading up to that lawsuit. That lawsuit was brought at the request of my predecessor as State Engineer, George L. Christopulos. Wyoming threatens no action to disturb the status quo with respect to storage in the Inland Lakes pending the outcome of this litigation. Attached hereto as Exhibit A is a certified copy of the "North Platte River Ownership and Natural Flow Accounting Procedures", bearing my signature, agreed to by Wyoming, Nebraska and the Bureau of Reclamation allowing storage of natural flow in the Inland Lakes as part of the agreed administration of the North Platte Decree for water year 1987. With respect to the Inland Lakes, the 1987 Accounting Procedures in Exhibit A incorporate the excerpt from the 1985 Accounting Procedures reproduced in Exhibit B.

6. The diversion of water in Wyoming for storage in the Inland Lakes cannot properly be administered by Wyoming water officials unless and until the Bureau of Reclamation and/or the irrigators who use water from the Inland Lakes obtain permits and water rights under Wyoming law for such diversion. A primary purpose of the permit procedure established nearly 100 years ago under Wyoming law is to define the parameters of a water right, such as the amount, priority, place of use, type of use and time of use, in order that the water right can be assimilated into the system of administration of all water rights on the river. The information provided by the permit is essential to the orderly

administration of water rights.

7. Attached hereto as Exhibit C is the 1982 certificate adjudicating the storage right for Grayrocks Reservoir on the Laramie River. That certificate does not provide for use of water to maintain minimum stream flows or for purposes other than industrial uses associated with operation of the Laramie River Station electric generating plant and incidental recreational uses of the reservoir.

8. Neither the State of Wyoming nor its water officials operate Grayrocks Reservoir. The operator of the reservoir is Basin Electric Power Cooperative, an association of consumer-owned electric utilities. Wyoming water officials have administered, and will in the future administer, the water rights for Grayrocks Reservoir according to its certificate and Wyoming law.

9. Permit applications for the Corn Creek Irrigation Project were submitted to my office on January 16, 1974, by the Corn Creek Reservoir Association. The current permit applicant is the Corn Creek Irrigation District. According to the permit applications, the supply of water for the Corn Creek Project would be primarily from storage water delivered from Glendo Reservoir on the North Platte River and Grayrocks Reservoir on the Laramie River. In addition, the permit applications request the right to divert water directly from the Laramie River near its mouth. No action has been taken by my office on the permit applications for the Corn Creek Project.

10. The water supply for the Corn Creek Project from Glendo Reservoir, if the Corn Creek Irrigation

District successfully negotiates a contract with the Bureau of Reclamation for delivery of such water, would be part of Wyoming's allocation from Glendo Reservoir under the 1953 modification of the North Platte Decree, *Nebraska v. Wyoming*, 345 U.S. 981 (1953).

11. The Corn Creek Project is the only significant water development project proposed to be developed in the vicinity of the confluence of the Laramie and North Platte Rivers. No such proposed project has been permitted.

(Signed)
Gordon W. Fassett
Wyoming State Engineer

Subscribed and sworn to me this 2nd day of September, 1987.

/s/ Leanna L. Clawson
Notary Public

My commission expires September 30, 1989.

SEAL

CERTIFICATE

THE STATE OF WYOMING)
COUNTY OF LARAMIE) SS
STATE ENGINEER)

I, Gordon W. Fassett, State Engineer *of the STATE OF WYOMING, do hereby certify that the following document, which is attached, is a full, true, and correct copy of the original document as the same appears of record or is on file in the State Engineer's Office and of which I have the legal custody, namely:*

North Platte River Ownership and Natural Flow
Accounting Procedures 1987

IN WITNESS WHEREOF, I hereunto set my hand at Cheyenne, Wyoming, this 2nd *day of* September *1987.*

(Signed)
Gordon W. Fassett

Subscribed and sworn to before me this 2nd *day of* September *1987.*

/s/ Francis A. Carr
Notary Public

My commission expires March 14th, *1991.*

Exhibit A to Affidavit of
Gordon W. Fassett

NORTH PLATTE RIVER OWNERSHIP AND NATURAL FLOW ACCOUNTING PROCEDURES
PART A.
STORAGE OWNERSHIP ACCOUNTING PROCEDURE

The parties to this criteria agree that administration and operation under this agreement are to conform with Wyoming and Nebraska State Laws, the U.S. Reclamation Law, and the U.S. Supreme Court Decree of 1945 and the 1952 Stipulation, as appropriate.

The North Platte system storage ownership shall equal the total storage in Seminoe, Kortes, Pathfinder, Alcova, Gray Reef, Glendo and Guernsey Reservoirs, except for water held in storage under separate contract for other entities by the Bureau of Reclamation or waters held in temporary storage.

All storage ownerships are to be filled in order of priority as provided in Paragraph III of the 1952 Modification of the U.S. Supreme Court Decree of 1945, Wyoming State Law and as water becomes available. Any water bypassed or spilled is to be charged to that ownership which may not then be refilled until all other appropriations from the river have been satisfied. No storage ownership delivery or evaporation charges will be assessed when water is being spilled from the system.

A one (1) day time lag will be used in computing the evaporation chargeable to each ownership. Evaporation chargeable today is considered to be equal to yesterday's total actual evaporation.

A. Pathfinder - 1,016,507 A.F. (current capacity)
Priority Date - 12/06/04

1. All river gains upstream of Pathfinder Reservoir for the October 1 through April 30 period are to accrue to this ownership until filled. Gains May 1 through September 30 in excess of natural flow demands may accrue to Pathfinder ownership until filled.

2. Any Pathfinder ownership in Guernsey Reservoir on September 30 will remain in Pathfinder ownership after October 1. This water will not transfer to Guernsey ownership, but will remain in Pathfinder ownership and may be transferred upstream as Guernsey ownership or the Inland Lakes accrue water. Pathfinder ownership transferred to the Inland Lakes will remain in Pathfinder ownership.

3. The Pathfinder evaporation charge is computed as though all Pathfinder ownership is in Pathfinder Reservoir except for that portion which may be in Guernsey Reservoir which shall be computed at the same rate as that of Guernsey Reservoir.

B. Inland Lakes

No agreement was reached as to storage in or for the account of the Inland Lakes. This matter is pending in litigation in the U.S. Supreme Court and in the U.S. District Court in Wyoming. The parties do not agree on the question whether natural flow may be stored from the North Platte River in or for the account of the Inland Lakes under the existing Wyoming permits for the North Platte Project. Reserving all of their legal rights, the parties agree that, during any water year, while this litigation is pending, natural flow water may be considered to accrue to the Inland Lakes account in accordance with the procedure set out in paragraph B of Part A of the 1985 North Platte River Ownership and Natural Flow Accounting Procedures, and further subject to the following conditions:

1. For the water year 1987, 46,000 A.F. has been credited to the Inland Lakes ownership account.

2. The Bureau and Nebraska will maintain and make available to Wyoming upon request records accounting for all water stored in the Inland Lakes or accrued to the Inland Lakes account in other reservoirs.

3. Nothing in these procedures is intended to restrict the delivery of North Platte Project storage water to the Inland Lakes.

C. Guernsey - 45,612 A.F. (current capacity)
Priority Date - 04/20/23

1. River gains upstream of Guernsey Reservoir for the October 1 through April 30 period and not credited to the Inland Lakes will accrue to this ownership until filled. Gains May 1 through September 30 in excess of natural flow demands may accrue to Guernsey ownership until filled.

2. The Guernsey evaporation charge is computed as though all Guernsey ownership is in Guernsey Reservoir.

3. The Hydrographer-Commissioner of District 14 will be notified in a timely manner of all releases made to fulfill contractual obligations to Federal water contractors by the Bureau of Reclamation.

4. Guernsey Reservoir releases after April 30 are to be natural flow calls upon the river following coordination among Wyoming, Nebraska and Bureau of Reclamation personnel. When Guernsey Reservoir releases exceed the natural flow of the river at this point, then the difference is a release of storage water.

5. Guernsey ownership transferred to the Inland Lakes will remain in Guernsey ownership.

D. Kendrick - 1,201,678 A.F. (current capacity; Seminoe - 1,017,273 A.F., Alcova - 184,405 A.F.) Priority Dates (Seminoe - 12/01/31, Alcova - 04/25/36)

1. All gains upstream of Seminoe Reservoir for the October 1 through April 30 period after Pathfinder and Guernsey ownerships have filled are to accrue to Kendrick (Seminoe) ownership until filled. Likewise, all gains upstream of Alcova Reservoir for the October 1 through April 30 period after Pathfinder and Guernsey ownerships have filled are to accrue to Kendrick (Alcova) ownership until filled. Gains May 1 through September 30 in excess of natural flow demands may accrue to the Kendrick ownership until filled.

2. The evaporation chargeable to Kendrick ownership shall be the actual Seminoe and Alcova Reservoirs evaporation yesterday, plus the evaporation for Kendrick ownership stored in any other reservoir but assumed to be in Seminoe Reservoir, minus any loss charged to storage held under contract for other entities by the Bureau of Reclamation in Seminoe Reservoir.

E. Glendo - 183,238 A.F. (current capacity)
Priority Date - 08/30/51

1. This ownership consists of a power head pool of 63,148 A.F. (elevation 4570), an irrigation ownership pool not to exceed 100,000 A.F. and an estimated evaporation pool of 20,090 A.F.

2. All gains upstream of Glendo Reservoir for the period October 1 through April 30 after the Pathfinder, Guernsey, and Kendrick ownerships and the Inland Lakes Account have filled are to accrue to the Glendo ownership until filled. At any time that the Guernsey ownership has filled and the Pathfinder or Kendrick ownerships have not filled, all gains between Alcova and Glendo will accrue to Glendo ownership. Gains May 1 through September 30 in excess of natural flow demands may accrue to this ownership until filled.

3. When the power head pool of 63,148 A.F. (elevation 4570) is filled, no further accounting need be made for this pool. This minimum power head pool can be filled but once from the river. All Glendo ownership evaporation will be charged against the irrigation pool unless storage for evaporation has been underestimated and evaporation encroaches upon the power head pool. In this case, refilling of the power head pool may be allowed as an exception by the Wyoming State Engineer.

4. Glendo ownership can accrue annually in the irrigation pool up to 40,000 A.F. plus estimated evaporation, provided this total irrigation ownership including carry-over storage does not exceed 100,000 A.F. plus estimated evaporation. Any difference between actual evaporation charged to the Glendo ownership and that estimated previously will be accounted for by adjustment of the next year's allowable storage for evaporation.

5. The Glendo ownership will be accounted for on both a State and an individual contractor basis. Such accounting will include accruals, releases, evaporation, exchanges and carry-over storage. Such amounts will be allocated by account in proportion to each entity's contracted amount of the Glendo water supply. Neither State will be allowed to accrue, in any one year, more than its proportionate share of the ownership (15,000 A.F. to Wyoming and 25,000 A.F. to Nebraska) nor will the irrigation pool including carry-over storage accrue beyond 37,500 A.F. for Wyoming or 62,500 A.F. for Nebraska.

6. The evaporation chargeable to the Glendo ownership is the total actual evaporation minus that chargeable to other ownerships and minus any loss charged to storage held under contract for other entities by the Bureau of Reclamation in Glendo Reservoir.

7. Gains Alcova to Glendo for the October 1 through April 30 period are to be computed as Glendo Reservoir

inflow minus 98% of the Gray Reef outflow two (2) days earlier.

F. Excess to Ownership Storage

1. River gains upsteam of Guernsey Reservoir in excess of natural flow demands not applied to storage ownership accounts will accrue to the "Excess to Ownership" storage account up to 12,000 acre-feet. The "Excess to Ownership" storage account shall be used as operational waste or regulation water only. Any "Excess to Ownership" water greater than 12,000 A.F. that is captured will be converted and released to fulfill natural flow demands. Regulation water not to exceed 12,000 A.F. may be carried over for use in the following year.

2. The "Excess to Ownership" Account will accrue and be released in such a manner so as not to interfere with authorized project purposes or as would endanger the safety of a structure.

PART B.
NATURAL FLOW COMPUTING PROCEDURE

Inflow to Seminoe Reservoir

The Seminoe inflow will be the sum of the flows of the North Platte River above the Seminoe Reservoir and the Medicine Bow River above Seminoe Reservoir.

Natural Flow above Alcova Reservoir

The natural flow above Alcova Reservoir will be the inflow to Seminoe plus the flow of the Sweetwater River entering Pathfinder Reservoir and to this total will be added the following accrual for each month:

May	June	July	August	September
90 cfs	45 cfs	40 cfs	35 cfs	35 cfs

The total of the Seminoe inflow plus the flow of the Sweetwater River plus the accrual will be called the natural flow entering Alcova Reservoir and will be passed through Alcova Reservoir and Gray Reef Reservoir without loss.

Gray Reef Reservoir to Glendo Reservoir

Water released at the Gray Reef Reservoir will be charged with the following losses between Alcova and Glendo Reservoirs.

May	June	July	August	September
113 cfs	131 cfs	140 cfs	131 cfs	115 cfs

There will be a two (2) day time lag in transporting water from Gray Reef Reservoir to Glendo Reservoir. Water released at Gray Reef Reservoir will reach Glendo Reservoir two (2) days after the release date.

Glendo Outflow

A one (1) day time lag will be used in transporting water through the Glendo Reservoir. Natural flow entering the Glendo Reservoir will one (1) day later be called the Glendo Outflow and be passed through the Glendo Reservoir without loss.

Glendo Reservoir Through Whalen Dam

Water released at Glendo Reservoir plus 20 cfs of river accrual will be called the Guernsey Reservoir inflow for that day. A one (1) day time lag will be used in bringing water from the Glendo Outflow through Whalen Dam which will include the two Government Canals just above Whalen Dam. This water will be passed through Whalen Dam without loss.

Whalen Dam to the Wyoming-Nebraska State Line or to the Tri-State Dam

A one (1) day time lag is used in taking water from the River Station below Whalen Dam to the River Station below Tri-State Dam.

River Losses Guernsey Reservoir to Nebraska State Line

A loss of natural flow may be borrowed from storage and replaced from subsequent gains. Carriage losses in the river section Guernsey Reservoir to the Wyoming-Nebraska State Line are as follows:

May	June	July	August	September
90 cfs	97 cfs	101 cfs	97 cfs	90 cfs

These ownership accounting and natural flow computing procedures shall be subject to revision and adoption at the annual Natural Flow and Ownership Meeting, and shall not be considered as applicable for any year not adopted. Conditions arising in exception to these procedures will be resolved by agreement by the signatory parties.

It is the intent of this document to provide a reasonable means to maintain the status quo and to provide for conflict-free administration of the river pending resolution of the matters now in litigation.

4/27/87 — /s/ Gordon W. Fassett
Date — Wyoming State Engineer

April 29, 1987 — /s/ Michael Jess
Date — Director, Nebraska Department of Water Resources

May 14, 1987 — /s/ David G. Wilde
Date — Project Manager, Bureau of Reclamation

CERTIFICATE

THE STATE OF WYOMING)
COUNTY OF LARAMIE) SS
STATE ENGINEER)

I, Gordon W. Fassett, State Engineer *of the STATE OF WYOMING, do hereby certify that the following document, which is attached, is a full, true, and correct copy of the original document as the same appears of record or is on file in the State Engineer's Office and of which I have the legal custody, namely:*

Excerpt from North Platte River Ownership and Natural Flow Accounting Procedures for 1985

IN WITNESS WHEREOF, I hereunto set my hand at Cheyenne, Wyoming, this 2nd *day of* September *1987.*

(Signed)
Gordon W. Fassett

Subscribed and sworn to before me this 2nd *day of* September *1987.*

/s/ Francis A. Carr
Notary Public

My commission expires March 14th, *1991.*

SEAL

Exhibit B to Affidavit of
Gordon W. Fassett

Excerpt From: NORTH PLATTE RIVER OWNERSHIP AND NATURAL FLOW ACCOUNTING PROCEDURES FOR 1985
PART A.
STORAGE OWNERSHIP ACCOUNTING PROCEDURE

* * *

B. Inland Lakes - 46,000 A.F. (Lakes Alice and Minatare)-

1. During the months of October, November and April gains downstream from Alcova Reservoir will accrue to the Inland Lakes, up to a total of 46,000 A.F., and at a rate not to exceed 910 cubic feet per second. These gains may be stored in Guernsey and Glendo Reservoirs and transferred to the Inland Lakes when Pathfinder Irrigation District resumes spring operations. The transfer is to be completed no later than May 15.

2. Evaporation will be charged to this ownership for water stored in upstream reservoirs at the rate determined for the reservoir where stored.

3. The amount of water transferred from this account to the Inland Lakes shall not exceed 46,000 A.F. annually less evaporation losses, measured into the Interstate Canal if other water is being released and at Guernsey if only the Inland Lakes water is being released.

April 29, 1985 /s/ *George L. Christopulos
Date Wyoming State Engineer

April 16, 1985 /s/ Michael Jess
Date Director, Nebraska Department of Water Resources

May 3, 1985 /s/ David G. Wilde
Project Manager
Bureau of Reclamation

*Section B of Part A is not agreed to, however, it is agreed that Inland Lakes can be filled this year because of the available water supply.

CERTIFICATE

THE STATE OF WYOMING)
COUNTY OF LARAMIE) SS
BOARD OF CONTROL)

I, Francis A. Carr, as Adjudication Officer of the Board of Control, of the STATE OF WYOMING, do hereby certify that the following named document, which is attached hereto, is a full, true and correct copy of the original document as the same appears of record in the office of said Board, namely:

Certificate Record R-8, page 771 which adjudicates Grayrocks Reservoir, Permit No. 7649 Res.

IN WITNESS WHEREOF, I hereunto set my hand and affix the Seal of said Board at Cheyenne, Wyoming, this 27th day of August, 1987.

(Signed)
Francis A. Carr, Adjudication Officer
Board of Control, State of Wyoming

*NOTE: If, on the utilization of this reservoir, the owners of said reservoir either by-pass water which is available for storage or release water already stored for purposes other than for which the reservoir is adjudicated water so released or by-passed will be counted against their storage allocation and water will not be recaptured to replace the by-passed or released water at the expense of other appropriators.

Exhibit C to Affidavit
of Gordon W. Fassett

THE STATE OF WYOMING

Certificate of Construction of Reservoir

Proof No. 32743
Certificate Record No. R-8, Page 771
Water Division No. 1, District No. 4

WHEREAS, Basin Electric Power Cooperative has presented to the State Board of Control of the State of Wyoming, proof of construction of the Grayrocks Reservoir, Permit No. 7649 Res., located in Sec. 5, 6, 7 & 13 T.25N., R.65W.; Sec. 1, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 29 & 30 T.25N., R.66W.; Sec. 36 T.26N., R.66W.; and Sec. 25 T.25N., R.67W., Platte County, Wyoming;

Whereas, the proof of construction sets forth that said reservoir has been completed in accordance with the terms of said permit to a capacity sufficient to impound 104,109.6 acre-feet of water; and that the source of the quantity of water authorized to be stored in the Grayrocks Reservoir is obtained from Laramie River, tributary North Platte River on which the reservoir is located,

NOW KNOW YE, That the State Board of Control, under the provisions of the Statutes of Wyoming, has by an order duly made 20 Nov. 1981 and entered on the 23rd day of March, A.D. 1982, in Order Record No. 25, Page 325, determined the priority and capacity of said reservoir as follows:

Name of Owner Basin Electric Power Cooperative; Address 1717 East Interstate Ave., Bismarck, N.D. 58501

Date of Priority April 23, 1973; Total available storage capacity in the Grayrocks Reservoir, as constructed under provisions of Permit No. 7649 Res., is ---104,109.6--- acre-feet. *FOR ADDITIONAL LIMITATIONS SEE NOTE ON ATTACHED TABLULATION SHEET

The right to store water is limited to such an amount as shall be beneficially used, not to exceed one filling annually of said reservoir, for *Industrial and Recreational use.

IN TESTIMONY WHEREOF, I, GEORGE L. CHRISTOPULOS, President of the State Board of Control, have hereunto set my hand this 23rd day of March, A.D. 1982, and caused the seal of said Board to be hereunto affixed.

ATTEST:

/s/ Paul Schwieger
Ex-officio Secretary.

/s/ George L. Christopulos
President.

No. 108. Original

In The Supreme Court

Of The United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,
v.
STATE OF WYOMING,
Defandant.

AFFIDAVIT OF MICHAEL K. PURCELL

STATE OF WYOMING)
) ss.
COUNTY OF LARAMIE)

MICHAEL K. PURCELL, being first duly sworn upon oath, states as follows:

1. I am Administrator of the Wyoming Water Development Commission ("the Commission"), an agency of the State of Wyoming created by WYO. STAT. § 41-2-117 (1987 Cum. Supp.). In that capacity, I am responsible for overseeing the staff of and carrying out the functions of the Wyoming Water Development Commission. Those functions include, but are not limited to, the planning, selection, financing, construction, acquisition and operation of projects and facilities for the conservation, storage, distribution and use of water necessary in the public interest to develop and preserve Wyoming's water and related land resources.

2. The Commission is the state agency responsible for planning, financing, constructing and operating

the proposed Deer Creek Dam and Reservoir on Deer Creek in Wyoming. Deer Creek is a right-bank tributary which enters the North Platte River between Pathfinder and Guernsey Reservoirs near Glenrock, Wyoming. As Administrator of the Commission, I am familiar with, and responsible for, planning and feasibility studies for Deer Creek Dam and Reservoir and other water development projects of the State of Wyoming.

3. The proposed Deer Creek Dam and Reservoir is the only water development project currently proposed and funded by Wyoming for construction on any of the tributaries of the North Platte River below Pathfinder Reservoir.

4. Deer Creek Dam and Reservoir, when constructed and operational, will provide a supplemental source of water to the City of Casper, and other smaller municipalities in Wyoming below Alcova Reservoir. Water from Deer Creek Reservoir will be used by the City of Casper and other municipalities upstream of the mouth of Deer Creek by exchange. Water will be delivered from Deer Creek Reservoir through Deer Creek to the North Platte River in exchange for water consumed from the North Platte River upstream by those municipalities. Water also will be delivered directly from Deer Creek Reservoir for use by downstream municipalities. Until the full annual yield of Deer Creek Reservoir is needed for those municipal uses, the Commission plans to temporarily allow the water available in excess of the municipal needs to be used for non-municipal purposes.

5. The primary beneficiary of Deer Creek Reservoir will be the City of Casper. The City of Casper now

provides a municipal water supply to a population of approximately 57,000. Studies conducted for the Wyoming Water Development Commission under my supervision have indicated that Casper's water rights are presently inadequate to meet the requirements of Casper's existing users in times of below average supply when water rights would be regulated in priority. Deer Creek Reservoir is needed to provide Casper with an adequate, reliable supply of municipal water for its present and future population.

6. The storage capacity of Deer Creek Reservoir will be approximately 66,000 acre-feet. Studies conducted under my supervision to provide information to the U.S. Army Corps of Engineers for preparation of an Environmental Impact Statement indicate that the dependable annual yield for consumptive uses of Deer Creek Reservoir will be approximately 6,400 acre-feet to 9,600 acre-feet depending on the resolution of the Inland Lakes issue. The large capacity of the reservoir is needed to produce this relatively small dependable yield because Deer Creek Reservoir will be able to store only water that is surplus to the needs of appropriators with senior water rights entitled under Wyoming law to water from Deer Creek.

7. On January 25, 1985, the Wyoming Water Development Commission applied to the U.S. Army Corps of Engineers for a dredge and fill permit for construction of Deer Creek Dam and Reservoir under § 404 of the Federal Water Pollution Control Act, 33 U.S.C. § 1344 (1982). A draft environmental impact statement was published by the Corps of Engineers in September, 1986. As part of the environmental impact statement and public review process on the § 404 permit, the Wyoming Water Development Commis-

sion has conducted detailed studies of the amount and timing of depletions to the North Platte River from the operation of Deer Creek Reservoir. The State of Nebraska has participated in the public hearings on the environmental impact statement for the § 404 permit and, through that participation, has had access to studies conducted by the Wyoming Water Development Commission and the Corps of Engineers.

8. Pursuant to Section 7 of the federal Endangered Species Act, the U.S. Army Corps of Engineers consulted with the U.S. Fish and Wildlife Service concerning the possible effects of the construction and operation of Deer Creek Dam and Reservoir on threatened and endangered species. The consultation included evaluation of possible effects on the endangered whooping crane and its critical habitat on the Platte River in central Nebraska. A biological opinion using the 9,600 acre-feet yield estimate was issued on July 20, 1987, by the U.S. Fish and Wildlife Service concluding that the construction and operation of Deer Creek Dam and Reservoir would not likely jeopardize the continued existence of any threatened or endangered species. The biological opinion also concluded that the construction and operation of the Deer Creek Dam and Reservoir would not adversely modify the critical habitat of the endangered whooping crane, if Wyoming funds and carries out certain conservation measures. Wyoming has entered into an agreement with the U.S. Fish and Wildlife Service to carry out, upon issuance of the § 404 permit, the conservation measures set out in the biological opinion.

9. Wyoming has appropriated $48.25 million for the design and construction of Deer Creek Reservoir

and, as of this date, has expended approximately $2.1 million for studies, plans and specifications, permitting, design and right-of-way acquisition for Deer Creek Dam and Reservoir.

10. It is necessary for municipalities in the North Platte drainage in Wyoming to use reservoirs for the conservation and regulation of water deliveries to their municipal water supply systems. Such storage is essential to enable municipalities to furnish reliable year-round water supplies for a number of reasons. Those include seasonal and annual variations in the physical availability of water in the North Platte River drainage, variations in the legal availability of water under the Wyoming priority system for administration of water rights, and restrictions imposed by the United States Supreme Court's North Platte Decree.

(Signed)
Michael K. Purcell

Subscribed and sworn to me this 2nd day of Sept., 1987.

/s/ Leanna L. Clawson
Notary Public

My commission expires September 30, 1989.

SEAL

No. 108. Original

In The Supreme Court

Of The United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,
v.
STATE OF WYOMING,
Defendant.

AFFIDAVIT OF STANLEY K. HATHAWAY

STATE OF WYOMING)
) ss.
COUNTY OF LARAMIE)

STANLEY K. HATHAWAY, being first duly sworn upon oath, states as follows:

1. I am attorney for the Corn Creek Irrigation District ("the District"), a public irrigation district created by order of the District Court of Goshen County, Wyoming, on January 20, 1978, pursuant to WYO. STAT. §§ 41-7-201, *et seq.* (1977). I have been the District's general counsel since its inception in 1978. I also represented the petitioning landowners who initiated the petition for the formation of the District in the District Court of Goshen County, Wyoming (Docket No. 19-460). In my capacity as the District's general counsel, I have been personally familiar with the proposed Corn Creek Project and the Corn Creek Irrigation District since the District's inception.

2. The Corn Creek Irrigation District is the successor to the Corn Creek Reservoir Association as sponsor of the proposed Corn Creek Project. When the Corn Creek Irrigation District was formed, all interest of the Corn Creek Rerservoir Association in contracts and permit applications related to the Corn Creek Project were conveyed to the District.

3. The Corn Creek Project, when completed, will provide water to irrigate lands in Goshen County, Wyoming, in the drainage of the North Platte and Laramie Rivers. Such lands are currently used for dryland farming. The primary sources of water supply for the Corn Creek Project will be from Glendo Reservoir on the North Platte River and from Grayrocks Reservoir on the Laramie River. Permit applications originally filed by the Corn Creek Reservoir Association and currently being pursued by the Corn Creek Irrigation District request the right to divert the water delivered from Glendo Reservoir and from Grayrocks Reservoir and, in addition, request the right to divert natural flow water from the Laramie River.

4. The Corn Creek Irrigation District, as successor to the Corn Creek Reservoir Association, has a contract with Basin Electric Power Cooperative, the operator of the Grayrocks Reservoir, for delivery of 22,500 acre-feet annually from Grayrocks Reservoir. That contract is recognized in paragraph 5 of the Agreement of Settlement and Compromise entered into among Basin Electric Power Cooperative, the State of Nebraska and others over the adequacy of the § 404 permit and Rural Electricfication Administration loan guarantees for the Grayrocks Reservoir.

5. The Corn Creek Irrigation District has requested the United States Bureau of Reclamation to enter into a water service contract for delivery of 10,100 acre-feet of water annually from Glendo Reservoir for the Corn Creek Project.

6. I was personally involved as counsel for the landowners who petitioned for formation of the District in the proceeding in the District Court of Goshen County, Wyoming, in 1977 and 1978 (Docket No. 19-460). I attended and participated in the two days of hearing held on January 5 and 6, 1978. The State of Nebraska appeared at that hearing by its Assistant Attorney General, Steven C. Smith, and local counsel, Gerald Connolly, and objected to the formation of the district. In that case, my clients requested the Court to dismiss the State of Nebraska for lack of standing. That request was denied and Nebraska was allowed to fully participate in that hearing. The statute under which the petition for formation of the district was filed, WYO. STAT. §§ 41-7-201, *et seq.* (1977), requires a finding that the project sponsored by the district is feasible. Nebraska argued that the Corn Creek Irrigation District would have an inadequate supply of water because Nebraska had prior rights to the water of the Laramie River under the Decree in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), and that the Corn Creek Project therefore was infeasible. The court overruled Nebraska's objection and found the project to be feasible.

7. The Corn Creek Project now proposed by the Corn Creek Irrigation District is essentially the same project that was proposed at the time of formation of the Corn Creek Irrigation District in 1978 and that was described in testimony before the District Court of

Goshen County, Wyoming, in the formation proceeding (Docket No. 19-460). The project has not yet been constructed because of the lack of sufficient funds.

(Signed)
Stanley K. Hathaway

Subscribed and sworn to me this 24th day of August, 1987.

/s/ Rick A. Thompson
Notary Public

Commission expires Febrary 15, 1988.

SEAL

No. 108. Original

In The Supreme Court

Of The United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff.
v.
STATE OF WYOMING,
Defandant.

AFFIDAVIT OF DOROTHY W. FRITZ

STATE OF WYOMING)
) ss.
COUNTY OF GOSHEN)

DOROTHY W. FRITZ, being first duly sworn upon oath, states as follows:

1. I am the Clerk of the District Court in and for the County of Goshen, State of Wyoming. I have occupied the position of Clerk of the Court continuously since January, 1979. In that capacity, I am the proper custodian of the records of the court and the proper officer to certify copies of such records.

2. I was Deputy Clerk of the District Court of Goshen County, Wyoming, in Janaury of 1978 when Docket No. 19-460, *In the Matter of the Corn Creek Irrigation District*, was tried to the court.

3. Attached hereto are certified copies of the following documents from the court's record in Docket

No. 19-460:

Petition for Formation of Irrigation District filed on November 17, 1977;

Objection to Petition for Formation of Irrigation District filed by the State of Nebraska on December 30, 1977;

Order dated January 20, 1978.

4. I made a diligent search of the record of the court in Docket No. 19-460. That search revealed that no appeal was taken from the January 20, 1978 order attached hereto.

(Signed)
Dorothy W. Fritz

Subscribed and sworn to me this 20th day of August, 1987.

/s/ Alice O. Jones
Notary Public

Commission expires on November 26, 1989.

SEAL

Exhibit A to Affidavit of
Dorothy W. Fritz

THE STATE OF WYOMING,
ss.
County of Goshen

I, Dorothy W. Fritz, Clerk of the Eighth Judicial District Court within and for the County and State aforesaid, so hereby certify the foregoing to be a true and complete copy of
PETITION FOR FORMATION OF
IRRIGATION DISTRICT
Docket 19-460

IN TESTIMONY WHEREOF, I have hereunto subscribed my hand and affixed the official seal of said Court, at my office in Torrington, Wyoming this 4th day of December A.D. 1986.

/s/ Dorothy W. Fritz
Clerk of District Court.
By _____
Deputy.

THE STATE OF WYOMING,
ss.
County of Goshen

I, J. T. Langdon, Judge of the District Court, in and for the County of Goshen, in the Eighth Judicial District of the State of Wyoming, do hereby certify that Dorothy W. Fritz who has given the preceding certificate, was at the time of so doing, the Clerk of the District Court, of the County and State aforesaid, duly qualified to act as such, that she is the proper custodian of the records of said Court and the proper officer to give such certificate, and that the same is in due form of law and that the signature thereto attached is her genuine signature.

WITNESS my hand at Torrington this 4th day of December 1986.

/s/ J. T. Langdon
Judge of the EIGHTH Judicial District.

THE STATE OF WYOMING)
) ss.
County of Goshen)

I, Dorothy W. Fritz, Clerk of the District Court in and for the County of Goshen, State of Wyoming, do hereby certify that the The Judge J.T. Langdon who has given the preceding certificate, was at the time of so doing, Judge of the EIGHTH Judicial District, duly elected and legally qualified to act as such, and to all whose acts, full faith and credit ought to be given.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Torrington in said County, this 4th day of December A.D. 1986.

/s/ Dorothy W. Fritz
Clerk of the District Court.

STATE OF WYOMING	)	IN THE
	) SS	DISTRICT COURT
COUNTY OF GOSHEN	)	FIRST JUDICIAL DISTRICT
IN THE MATTER OF THE	)	19-460
CORN CREEK IRRIGATION	)	FILED
DISTRICT.	)	NOV 17, 1977

PETITION FOR FORMATION OF IRRIGATION DISTRICT

COMES NOW the undersigned petitioners and respectfully represent to the Court as follows:

I.

The undersigned and the signers of accompanying petitions identical herewith constitute a majority of the freeholders owning more than one-third of the lands within the proposed district, the boundaries of which are hereinafter particularly described, all of which land lies within Goshen County, Wyoming, and state that it is their purpose to organize an irrigation district under the laws of the State of Wyoming.

II.

Your Petitioners desire to provide for the irrigation of approximately fifteen thousand acres of lands that are presently dry farm and grazing lands, by means of a sprinkler irrigation system or systems to be constructed and supplied with irrigation water stored in two or more reservoirs and delivered to the lands by a pumping and delivery system to be constructed as hereinafter described.

III.

Your petitioners desire that the name of the district be designated CORN CREEK IRRIGATION DISTRICT.

IV.

The necessity for the proposed irrigation works results from the following facts:

All the lands included in said district are arid lands and, without irrigation, have a limited productivity. Approximately 42 percent of the land area within the district is planted to dry land wheat in a summer fallow method that requires half of the land to be idle and non-productive each year. Approximately 58 percent of the land is grazing land with grass production limited by inadequate rainfall. Under irrigation said lands would develop a high degree of productivity and become of great value commercially. An adequate supply of water for irrigation of said lands exists under the ownership of Corn Creek Reservoir Association by virtue of a contract for storage of 22,500 acre feet of water to be stored in the Greyrocks Reservoir to be constructed, and an additional 10,600 acre feet of water stored in Glendo Reservoir which will be contracted from the Bureau of Reclamation. The participation of the district in the ownership and construction of Greyrocks Reservoir, as well as the construction of pumping and delivery systems to deliver irrigation water to the lands of the district, will be financed by loans from the State of Wyoming and one or more funding agreements with agencies of the United States. All of said funding arrangements require the formation of an irrigation district as a legal entity capable of assessing benefits to the lands as well as construction and maintenance charges against the lands to be irrigated; and that your petitioners have no other source of securing water for the irrigation of said lands in a practical and feasible manner except by the organization of the proposed district and construction of irrigation works as herein described.

V.

The object and purpose of the system proposed to be constructed is to irrigate for the first time all of the lands included within said district which constitute approximately fifteen thousand acres. The general description of the irrigation works is as follows:

The water supply originates from two different major drainages, being the Laramie River and the North Platte River. This water will be diverted from near the confluence of the Laramie and Platte Rivers and water delivered from either or both sources. With regard to the North Platte River, water stored in Glendo Reservoir reserved for irrigation in this area will be contracted from the Bureau of Reclamation in the amount of 10,600 acre feet. The Corn Creek Reservoir Association has initiated a water service contract with the Bureau and no major problems are anticipated.

On the Laramie River, a large reservoir named Greyrocks is being planned by the Basin Electric Cooperative, harnessing flood flows and providing a water supply for a steam electric generating plant. There is a reserve capactiy planned in the reservoir which Corn Creek Reservoir Association has contracted for to insure 22,500 acre feet of water to be delivered to the Laramie River Bridge annually. 15,000 acre feet will be delivered from April 1st to October 1st annually and 7,500 acre feet will be delivered during the balance of each year. This storage water has been traded for senior direct flow rights on the Laramie River held by the Corn Creek Reservoir Association.

The proposed system will place under sprinkler irrigation approximately 1,430 acres on a bench known as Harmony Heights and 13,700 acres below the bench in Goshen Hole. Water will be conveyed by pipeline and concrete lined canal from the confluence of the Laramie and North Platte Rivers to Teeters Reservoir, a storage reser-

voir to be built on Cherry Creek. The Harmony Heights acreage will be irrigated from lateral pipelines off the main pipeline. Acreage in Goshen Hole will receive Teeters Reservoir storage water via a network of concrete line distribution canals. Water delivered to the farm units is repressurized by centrifugal booster pumps and distributed on the land primarily by center pivot sprinklers, each wetting approximately 130 acres.

Although the lands to be included in said district, hereinafter described in this Petition, amount to approximately 20,000 acres, it is anticipated that only 15,000 acres thereof, more or less, will be irrigated. Center pivot systems, it is anticipated, will irrigate only about 84% of each quarter section of land and some lands included in the district will necessarily have to be excluded from irrigation because of soil and topographical conditions.

The river pumping plant will be located approximately fifty feet from the confluence of the North Platte and Laramie Rivers and will be of the false well type. A 43 inch intake line will extend to the south bank of the Laramie River terminating at a concrete wing wall. The water will then be pumped to can-type verticle turbine pumps and boosted to a pressure needed to pump water to an upper elevation. The pressure developed by this booster pump will be utilized by most of the sprinklers on Harmony Heights. Unused water is then conveyed by a concrete lined canal to the proposed Teeters Reservoir which will have an active storage capacity of approximately 15,700 acre feet. During the off-irrigation season additional water will be pumped into Teeters Reservoir. During the growing season water will be released from Teeters Reservoir into a concrete lined canal distribution system which will serve the district lands in Goshen Hole.

The distribution system in the Harmony Heights area will be completely closed and equipped with remote control

valves that will automatically close if a sprinkler system should stop, thus preventing overwatering. Small booster pumps serving the individual sprinkler system will be installed near the terminal points of the pipeline. In the Goshen Hole area, concrete sumps incorporated into the canals will be utilized. Centrifigual pumps located on concrete pads adjacent to those sumps will provide pressure for the sprinkler systems. The plan will also include the installation of transmission lines and substations to wheel Basin Electric Power from its main transmission line.

The estimated cost of the district's participation in the construction of Greyrocks Reservoir is $6,000,000 which will be fully reimbursed by Basin Electric Power Cooperative under the contract with Corn Creek Reservoir Association. The estimated costs of the remainder of the project system to bring water to individual farm units, without individual sprinkler systems, is $11,264,000. It is contemplated that $5,068,800 of this amount would be furnished by the Soil Conservation Service of the United States Department of Agriculture under Public Law 566 or RC&D cost sharing programs. The cost share of the district in the amount of $6,195,200 would be financed under a four percent interest loan from the State of Wyoming amortized over a forty year period.

VI.

A general description of the lands, all in Goshen County, Wyoming, proposed to be included in said district is as follows, to-wit:

IN TOWNSHIP 23 NORTH, RANGE 63 WEST OF THE 6th P.M.
Section 19: NE¼; S½SW¼
Section 20: W½SW¼
Section 28: W½SW¼; SE¼; W½NW¼
Section 29: E½; SW¼; N½NW¼
Section 30: S½; NE¼; N½NW¼

Section 31: NE¼
Section 32: N½
Section 33: NW¼

IN TOWNSHIP 23 NORTH, RANGE 64 WEST OF THE 6th P.M.
Section 4: SW¼
Section 5: E½; SW¼; S½NW¼
Section 6: S½
Section 7: N½; SE¼
Section 15: W½
Section 17: W½
Section 19: All
Section 20: W½; SE¼
Section 21: All
Section 22: W½
Section 23: SW¼; W½SE¼; SE¼SE¼
Section 24: S½SW¼; S½SE¼
Section 25: N½; SE¼
Section 26: NW¼; W½NE¼; NE¼NE¼
Section 27: NW¼; E½NE¼
Section 28: N½
Section 29: E½; E½NW¼; NW¼NW¼
Section 30: NE¼

IN TOWNSHIP 23 NORTH, RANGE 65 WEST OF THE 6th P.M.
Section 1: All
Section 2: E½
Section 10: SE¼
Section 11: SW¼; NE¼; N½SE¼
Section 12: NE¼; SW¼; W½NW¼
Section 13: SW¼
Section 14: All
Section 15: NE¼
Section 23: NE¼
Section 24: All

IN TOWNSHIP 24 NORTH, RANGE 63 WEST OF THE 6th P.M.
Section 16: W½
Section 17: NE¼
Section 18: SW¼
Section 19: SE¼
Section 20: W½; NE¼
Section 29: S½SW¼; SE¼; NW¼
Section 30: NE¼; S½
Section 32: NW¼

IN TOWNSHIP 24 NORTH, RANGE 64 WEST OF THE 6th P.M.
Section 11: E½
Section 13: SE¼
Section 24: E½
Section 28: NE¼SW¼
Section 31: S½
Section 32: S½; NE¼
Section 33: All

IN TOWNSHIP 24 NORTH, RANGE 65 WEST OF THE 6th P.M.
Section 25: SE¼
Section 35: E½
Section 36: E½; SW¼

IN TOWNSHIP 25 NORTH, RANGE 64 WEST OF THE 6th P.M.
Section 21: All
Section 22: S½
Section 28: All

VII.

There are no entrymen on public lands in said district and the names of the freeholders owning lands in said district so far as known to your Petitioners are as follows: Denny-Stricker Livestock, Inc., Melvin R. Eaton, Francis B.

Austin, Carl O. Carlson, Jr., Carol J. Carlson, E. Leva Carlson, A.J. Bar Ranch, Inc., Violet Price, Ronald R. Price, State of Wyoming, Gordon G. Booth, Mary Ann Booth, Katie Marlin, Francis E. Clark, Jessie L. Lillie, Haas Farms, Inc., H and T Ranch Company, Earl McClun, Mary McClun, Gilbert L. Bernbeck, Gayle Bernbeck, John C. Teeters, Lillian I. Teeters, Ronald C. Teeters, Kenneth H. Yorges, Berneice Yorges, Kenneth Pursley, Kenneth S. Peterson, Carol J. Peterson, Harold Ernst, E. Beth Ernst, Russell E. Stout, Mary Charlotte Stout, Wallace Newton, Dorothy L. Newton, Austin G. Felton, Eva Margaret Felton, Mary Margaret Byergo, Frank Austin Felton, John Horace Felton, Ernest Erzinger, Mildred Erzinger, Kermit Brown, Ellen Brown, Joel Teeters, Estate of Merl Teeters, Tri-County Grain Company, B & J Associates (a limited partnership consisting of Ruth Johnston and Enoch Baumgardner).

VIil.

While the lands proposed to be included in the irrigation district are not all contiguous your Petitioners allege that the benefits of the proposed work in each part will exceed the damages from and costs of said proposed work in each part and the proposed work can be done more cheaply if in a single district than otherwise.

IX.

The Petitioners desire and propose to cooperate with the United States as herein described.

X.

Accompanying this Petition is a preliminary engineering report on the feasibility of the project, including a report on the sufficiency of its water supply, the approximate area of irrigable land within the district, and an estimate of the cost of construction, all of which has been approved by the State Engineer of Wyoming.

WHEREFORE, your Petitioners pray that a hearing be fixed upon this Petition directing the Clerk of this Court to cause the proper and statutory notice of its filing to be given, and that upon said hearing an Order be made and entered by the Court approving and confirming this Petition, defining the boundaries of the District, dividing the district into five subdivisions to be known as Commissioner Districts and establishing this proposed district as a corporation, to be known as CORN CREEK IRRIGATION DISTRICT, with all the powers granted by law and appointing five commissioners with the duties and powers vested in such commissioners by law.

(signatures omitted)

Exhibit B to Affidavit of
Dorothy W. Fritz

THE STATE OF WYOMING,)
)ss.
County of Goshen)

I, Dorothy W. Fritz, Clerk of the Eighth Judicial District Court within and for the County and State aforesaid, so hereby certify the foregoing to be a true and complete copy of
OBJECTION TO PETITION FOR FORMATION OF IRRIGATION DISTRICT
Docket 19-460

IN TESTIMONY WHEREOF, I have hereunto subscribed my hand and affixed the official seal of said Court, at my office in Torrington, Wyoming this 4th day of December A.D. 1986.

/s/ Dorothy W. Fritz
Clerk of District Court.
By _____
Deputy.

THE STATE OF WYOMING,)
) ss.
County of Goshen)

I, J. T. Langdon, Judge of the District Court, in and for the County of Goshen, in the Eighth Judicial District of the State of Wyoming, do hereby certify that Dorothy W. Fritz who has given the preceding certificate, was at the time of so doing, the Clerk of the District Court, of the County and State aforesaid, duly qualified to act as such, that she is the proper custodian of the records of said Court and the proper officer to give such certificate, and that the same is in due form of law and that the signature thereto attached is her genuine signature.

WITNESS my-hand at Torrington this 4th day of December 1986.

/s/ J. T. Langdon
Judge of EIGHTH Judicial District.

THE STATE OF WYOMING,)
) ss.
County of Goshen)

I, Dorothy W. Fritz, Clerk of the District Court in and for the County of Goshen, State of Wyoming, do hereby certify that the The Judge J.T. Langdon who has given the preceding certificate, was at the time of so doing, Judge of the EIGHTH Judicial District, duly elected and legally qualified to act as such, and to all whose acts, full faith and credit ought to be given.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Torrington in said County, this 4th day of December A.D. 1986.

/s/ Dorothy W. Fritz
Clerk of the District Court.

IN THE DISTRICT COURT
FIRST JUDICIAL DISTRICT

IN THE MATTER OF THE	)	19-460
	)	OBJECTION TO
CORN CREEK	)	PETITION FOR
	)	FORMATION OF
IRRIGATION DISTRICT.	)	IRRIGATION DISTRICT

COMES NOW the State of Nebrska, by and through Paul L. Douglas, Attorney General of the State of Nebraska, by the authority vested in his office under Neb.Rev.Stat. §84-207 (Reissue 1976), and objects to the petition filed herein for reason that said petition and accompanying preliminary engineering report fail to fairly and reasonably establish the feasibility of the district and the sufficiency of the proposed water supply. In support of this objection the objector respectfully represents to the court as follows:

I.

That the State of Nebraska files this objection under the provisions of section 41-279 *Wyo. Stats.* (1957), as a person who may be affected by the formation of the Corn Creek Irrigation District since the waters proposed to be appropriated and used by the district are waters which normally flow from the Laramie River into the North Platte River and are eventually used by Nebraska citizens for agricultural, industrial and domestic purposes. These Laramie River flows, by contributing to the total flow of the North Platte River in Nebraska, are also necessary to maintain the quality of the environment in the North Platte and Platte River Basins in Nebraska.

II.

That the petitioner states that it has a contract for storage of 22,500 acre-feet of water with Basin Electric Power Cooperative, which water is to be stored in the

proposed Greyrocks Reservoir which is to be located on the Laramie River in Wyoming.

III.

That before Greyrocks Reservoir can be constructed, Section 404 of the Federal Water Pollution Control Act (33 U.S.C. §1344, as amended) requires the issuance of a permit by the United States Army Corps of Engineers. Thus far, Basin Electric Power Cooperative, as project manager, has failed to obtain this permit from the Corps. Without said permit the reservoir cannot be constructed and without the reservoir Basin Electric Power Cooperative cannot deliver 22,500 acre-feet of storage water to the district.

IV.

That the State of Nebraska has filed a complaint in the United States District Court for the District of Nebraska (State of *Nebraska v. Rural Electrification Administration, et al.*, CV-76-L-242), a copy of which is attached hereto and incorporated herein. Basin Electric Power Cooperative, as project manager, has been permitted to intervene as a party defendant in that proceeding which is scheduled for trial in October, 1978. Also attached hereto and incorporated herein is an affidavit of James L. Grahl, which was filed in support of the motion of Basin Electric Power Cooperative to intervene in those proceedings. The objectors respectfully request the court to consider the statement in paragraph 8 of that affidavit. The statement in paragraph 8 clearly shows that construction of Grayrocks Reservoir and Power Plant depends upon Rural Electrificatioin Administration guaranteed financing. Pendency and final resolution of that action could jeopardize project financing and construction, and accordingly, the ability of Basin Electric Power Cooperative to deliver 22,500 acre-feet of water to the petitioners herein.

V.

That the State of Nebraska has been and is currently negotiating with Basin Electric Power Cooperative concerning the construction and operation of the proposed Greyrocks Reservoir. The State of Nebraska has offered to withdraw its litigation and objections to the issuance of the 404 Permit if Basin Electric Power Cooperative guarantees to release certain amounts of water from the reservoir which will flow into the North Platte River and into Nebraska for uses within Nebraska. The State of Nebraska believes that guaranteed releases from the reservoir will protect rights and established uses of Nebraska citizens to those flows in addition to those rights to the contributions of water the Laramie River makes to the North Platte River which accrue to the State of Nebraska under the United States Supreme Court decree in *Nebraska v. Wyoming*, 352 U.S. 589 (1945), as modified June 15, 1953. Furthermore we also seek, through an agreement on guaranteed releases, to alleviate our concern that the water consumed in generating electricity by the project may have detrimental effects upon the environment and economy of the State of Nebraska. The objector believes that there is not enough water available in the Laramie River, including all water proposed to be impounded in Greyrocks Reservoir, to meet the total requirements of the State of Nebraska, the project and the proposed irrigation district.

VI.

That because of the foregoing the State of Nebraska submits that there are serious doubts about the reliability, sufficiency and future status of the district's proposed water supply.

WHEREFORE, the objector prays that the court dismiss said petition at the cost of the petitioner. In the alternative the objector prays this court enter an order continuing this matter until Basin Electric Power Cooperative has received its Section 404 Permit from the Corps of Engineers and until the issues in *Nebraska v. Rural Electrification Association, et al.*, have been resolved, or until such other time or contingency as the court may deem proper.

(Signed)
Paul L. Douglas
Attorney General
State of Nebraska
2115 State Capitol
Lincoln, Nebraska 68509
Tel. (402) 471-2682

(Signed)
Gerald Connolly, Local Counsel
110 West 22nd Avenue
Torryington, [sic] Wyoming 82240

STATE OF NEBRASKA)
) ss.
COUNTY OF LANCASTER) VERIFICATION

Paul L. Douglas, being first duly sworn deposes and says that the is the duly elected and acting Attorney General of the State of Nebraska, that he is one of the attorneys for the objector in the above entitled cause, that he has read the above and foregoing Objection and knows the contents thereof and that the allegations of fact in said Objections are true as he verily believes.

(Signed)
Paul L. Douglas, Attorney General
Subscribed and sworn to before me this 29th day of December, 1977.
/s/ Dorothy N. Jones
Notary Public

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Objection to Petition for Formation of Irrigation District upon Mr. Bob C. Sigler, 2020 East "D" Street, Torrington, Wyoming 28840, on this 29th day of December, 1977, by mailing said copy through the United States Mail, with first class postage prepaid.

(Signed)
Paul L. Douglas
Attorney General
State of Nebraska

(Signed)
Gerald Connolly, Local Counsel
110 West 22nd Avenue
Torrington, Wyoming

Exhibit C to Affidavit of
Dorothy W. Fritz

THE STATE OF WYOMING,)
) ss.
County of Goshen)

I, Dorothy W. Fritz, Clerk of the Eighth Judicial District Court within and for the County and State aforesaid, so hereby certify the foregoing to be a true and complete copy of ORDER Docket 19-460

IN TESTIMONY WHEREOF, I have hereunto subscribed my hand and affixed the official seal of said Court, at my office in Torrington, Wyoming this 4th day of December A.D. 1986.

/s/ Dorothy W. Fritz
Clerk of District Court.
By
Deputy.

THE STATE OF WYOMING,)
) ss.
County of Goshen)

I, J.T. Langdon, Judge of the District Court, in and for the County of Goshen, in the Eighth Judicial District of the State of Wyoming, do hereby certify that Dorothy W. Fritz who has given the preceding certificate, was at the time of so doing, the Clerk of the District Court, of the County and State aforesaid, duly qualified to act as such, that she is the proper custodian of the records of said Court and the proper officer to give such certificate, and that the same is in due form of law and that the signature thereto attached is her genuine signature.

WITNESS my hand at Torrington this 4th day of December 1986.

/s/ J. T. Langdon
Judge of EIGHTH Judicial District.

THE STATE OF WYOMING,)
) ss.
County of Goshen)

I, Dorothy W. Fritz, Clerk of the District Court in and for the County of Goshen, State of Wyoming, do hereby certify that the The Judge J.T. Langdon who has given the preceding certificate, was at the time of so doing, Judge of the EIGHTH Judicial District, duly elected and legally qualified to act as such, and to all whose acts, full faith and credit ought to be given.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Torrington in said County, this 4th day of December A.D. 1986.

/s/ Dorothy W. Fritz
Clerk of the District Court.

STATE OF WYOMING)
) SS
COUNTY OF GOSHEN)

		IN THE
In The Matter Of The	)	DISTRICT COURT
	)	EIGHTH
CORN CREEK	)	JUDICIAL DISTRICT
IRRIGATION DISTRICT	)	Docket No. 19-460

ORDER

The Petition for the formation of the Corn Creek Irrigation District having come on for hearing on the 5th and 6th days of January, 1978, the petitioners appearing by and through their attorneys Stanley K. Hathaway, Bob C. Sigler and Dan J. Pauli; the contestants Wallace and Dorothy Newton and A.J. Bar Ranch Inc., appearing by and through their attorney Frank J. Jones; the State of Nebraska appearing by the through Steven C. Smith, Assistant Attorney General, State of Nebraska and Gerald Connolly; and the contestants, Robert T. Nelson, O.L. Barkman, Herbert W. Walker, Kenneth M. Walker, Ellen L. Walker, Al Barkman, Patricia C. Barkman, Leo Clark, Norma Clark, Alfred H. Barkman, Erma L. Barkman, Virgil Jagger, Edith A. Jagger, Merle J. Lisle and Shirley A. Lisle, (being the purported purchasers of land from Gurney and Edna Bernice Gregg), Lillie Motsick, William J. Motsick, Wallace Newton (as to his separate petition to exclude lands not presently included in the boundaries of the proposed district), Kenneth R. Pursley, Dale Bremer, Miriam Bremer, Ralph Bremer, Lenore Bremer, Tony Pontarola, Pete Pontarola, James M. Pontarola, Jeanette M. Pontarola, J.E. Tittle, Louise Tittle, Bruce A. Jagger, Trustee, R.E. Thompson, Evelyn P. Thompson, William A. Duncan, Keith O. Duncan and Charles Ross appearing through Bruce A. Jagger and Gerald Connolly; and Bruce A. Jagger also representing himself as trustee and personally as a contestant; and the Court having examined the files herein and having heard all the testimony and the

arguments of counsel and being fully advised in the premises:

THE COURT DOTH FIND that the Petition filed herein for the formation of the Corn Creek Irrigation District is sufficient and that it is signed by a sufficient number of parties and that due and timely notice of this hearing has been given as required by law and by Order of this Court, and that the Court has jurisdiction in this matter.

THE COURT DOTH FURTHER FIND that the Corn Creek Irrigation District as proposed is feasible and that the report of the engineer accompanying said Petition is sufficient and the approval of the State Engineer is adequate and that an Order should be entered for the formation of said District.

THE COURT DOTH FURTHER FIND, as to the protest filed by the State of Nebraska, that the State of Nebraska has no right to the waters in the Laramie River under the authority of the cases of *Wyoming v. Colorado*, 298 U.S. 573, 578 (1936), *Nebraska v. Wyoming*, 325 U.S. 589 (1945), and *Wyoming v. Colorado*, 353 U.S. 953 (1957), or any other authority, law, statute or regulation of any nature whatsoever, and that it furthermore has no interest in the 10,600 acre feet of Glendo Unit Storage water of the Bureau of Reclamation which forms a part of the water supply for the proposed District, and therefore, the State of Nebraska has no grounds for objection to the creation of said District and that its protest should therefore be denied.

THE COURT DOTH FURTHER FIND that the protest filed on behalf of the A.J. Bar Ranch Inc., to have its land excluded from the proposed District should be denied for the reason that there has been no sufficient showing that said land is not properly includable in the boundaries of the proposed District and for the additional reason that A.J. Bar Ranch, Inc., had indicated a desire to have its lands included

within the District and had not indicated a contrary desire until the first day of the hearing before this Court. The Court further notes, however, that prior to the hearing on the Commissioners Report, the Commissioners appointed by the Court, should make a thorough investigation of all property proposed to be included in the District and that the Commissioners at that time should closely examine lands of the A.J. Bar Ranch, Inc., to determine if said lands will be benefited if included within the District and whether the burden upon said contestants might be eased by replacing some of their lands with other lands belonging to freeholders who desire to come into the District.

THE COURT DOTH FURTHER FIND that Wallace and Dorothy Newton have filed a Petition herein to have the following lands excluded from the boundaries of the proposed District, to-wit:

TOWNSHIP 23 NORTH, RANGE 65 WEST OF THE 6th P.M. GOSHEN COUNTY

Section 1: All
Section 2: E½

And the Court further finds that said lands of Wallace and Dorothy Newton, and only those lands above listed, should be excluded from the boundaries of the proposed District.

THE COURT DOTH FURTHER FIND that certain contestants have filed Petitions and Objections herein seeking to have this Court permanently exclude from the boundaries of the proposed District certain lands listed in said Petitions and Objections which lands are not presently located within the boundaries of the proposed District; the names of said contestants being as follows, to-wit: Robert T. Nelson, O.L. Barkman, Herbert W. Walker, Kenneth M. Walker, Ellen L. Walker, Al Barkman, Patricia C. Barkman, Leo Clark, Norma Clark, Alfred H. Barkman, Erma L. Barkman, Virgil Jagger, Edith A. Jagger, Merle J. Lisle and Shirley A. Lisle (being the purported purchasers of land

from Gurney and Edna Bernice Gregg), Lillie Motsick, William J. Motsick, Wallace Newton, Kenneth R. Pursley, Dale Bremer, Miriam Bremer, Ralph Bremer, Lenore Bremer, Tony Pontarola, Pete Pontarola, James M. Pontarola, Jeanette M. Pontarola, J.E. Tittle, Louise Tittle, Bruce A. Jagger, Trustee, R.E. Thompson, Evelyn P. Thompson, William A. Duncan, Keith O. Duncan and Charles Ross. The Court further finds that it does not have jurisdiction to permanently exclude said lands owned by said parties from the boundaries of the District and that even if the Court does have such jurisdiction, the Court finds that this is not an appropriate time to have such lands permanently excluded, and that therefore the Petitions and Objections of said contestants should be denied.

THE COURT DOTH FURTHER FIND that the proposed Corn Creek Irrigation District should be divided into five (5) Commissioner Districts, as hereinafter set forth, and that the following named individuals should be appointed as the first commissioners of said District, to-wit: Gordon G. Booth, Joel Teeters, Albert Goertz, Enoch Baumgardner and Melvin R. Eaton.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That the Petition for the formation of the Corn Creek Irrigation District filed herein be, and the same is hereby, in all things ratified, approved and confirmed.

2. That the Corn Creek Irrigation District, with the boundaries hereinafter fixed and determined, be, and the same is hereby organized and established as a corporation by the name of the the "CORN CREEK IRRIGATION DISTRICT" with all powers and rights granted to such corporations pursuant to Wyoming law.

3. That the State of Nebraska has no right to the waters in the Laramie River under the authority of the cases of

Wyoming v. Colorado, 298 U.S. 573, 578 (1936), *Nebraska v. Wyoming*, 325 U.S. 589 (1945), and *Wyoming v. Colorado*, 353 U.S. 953 (1957), or under any other authority, law, statute or regulation of any nature whatsoever, and that it furthermore has no interest in the 10,600 acre feet of Glendo Unit Storage water of the Bureau of Reclamation which forms a part of the water supply for the Corn Creek Irrigation District, and therefore, the objection of the State of Nebraska to the formation of said District, be, and the same is hereby, denied.

4. That the protest of A.J. Bar Ranch Inc., to have its lands excluded from the boundaries of the Corn Creek Irrigation District be, and the same is hereby, denied.

5. That the protest filed herein by Wallace and Dorothy Newton to have the following lands excluded from the Corn Creek Irrigation District, to-wit:

TOWNSHIP 23 NORTH, RANGE 65 WEST OF THE 6th P.M. GOSHEN COUNTY

Section 1: All
Section 2: E½

is hereby granted and said lands, and only said lands, are hereby ordered excluded from the boundaries of the District.

6. That the Petitions and Objections of the following named contestants to have the lands described in their Petitions and Objections (which lands are not presently included in the boundaries of the Corn Creek Irrigation District) permanently excluded from the boundaries of the Corn Creek Irrigation District be, and the same are hereby denied, to-wit: Robert T. Nelson, O.L. Barkman, Herbert W. Walker, Kenneth M. Walker, Ellen L. Walker, Al Barkman, Patricia C. Barkman, Leo Clark, Norma Clark, Alfred H. Barkman, Erma L. Barkman, Virgil Jagger, Edith A. Jagger, Merle J. Lisle and Shirley A. Lisle (being the

purported purchasers of land from Gurney and Edna Bernice Gregg), Lillie Motsick, William J. Motsick, Ralph Bremer, Lenore Bremer, Miriam Bremer, Dale Bremer, Kenneth R. Pursley, Wallace Newton, Tony Pontarola, Pete Pontarola, James M. Pontarola, Jeannette M. Pontarola, J.E. Tittle, Louise Tittle, Bruce A. Jagger, Trustee, R.E. Thompson, Evelyn P. Thompson, William A. Duncan, Keith O. Duncan and Charles Ross.

7. That the boundaries of said Corn Creek Irrigation District shall be the exterior boundaries of the following lands which are hereby included in said District, to-wit:

IN TOWNSHIP 23 NORTH, RANGE 63 WEST OF THE 6th P.M.

Section 19: NE¼; S½SW¼
Section 20: W½SW¼
Section 28: W½SW¼; SE¼; W½NW¼
Section 29: E½; SW¼; N½NW¼
Section 30: S½; NE¼; N½NW¼
Section 31: NE¼
Section 32: N½
Section 33: NW¼

IN TOWNSHIP 23 NORTH, RANGE 64 WEST OF THE 6th P.M.

Section 4: SW¼
Section 5: E½; SW¼; S½NW¼
Section 6: S½
Section 7: N½; SE¼
Section 15: W½
Section 17: W½
Section 19: All
Section 20: W½; SE¼
Section 21: All
Section 22: W½
Section 23: SW¼; W½SE¼; SE¼SE¼

Section 24: S½SW¼; S½SE¼
Section 25: N½; SE¼
Section 26: NW¼; W½NE¼; NE¼NE¼
Section 27: NW¼; E½NE¼
Section 28: N½
Section 29: E½; E½NW¼; NW¼NW¼
Section 30: NE¼

IN TOWNSHIP 23 NORTH, RANGE 65 WEST OF THE 6th P.M.

Section 10: SE¼
Section 11: SW¼; NE¼; N½SE¼
Section 12: NE¼; SW¼; W½NW¼
Section 13: SW¼
Section 14: All
Section 15: NE¼
Section 23: NE¼
Section 24: All

IN TOWNSHIP 24 NORTH, RANGE 63 WEST OF THE 6th P.M.

Section 16: W½
Section 17: NE¼
Section 18: SW¼
Section 19: SE¼
Section 20: W½; NE¼
Section 29: S½SW¼; SE¼; NW¼
Section 30: NE¼; S½
Section 32: NW¼

IN TOWNSHIP 24 NORTH, RANGE 64 WEST OF THE 6th P.M.

Section 11: E½
Section 13: SE¼
Section 24: E½
Section 28: NE¼SW¼

Section 31: S½
Section 32: S½; NE¼
Section 33: All

IN TOWNSHIP 24 NORTH, RANGE 65 WEST OF THE 6th P.M.

Section 25: SE¼
Section 35: E½
Section 36: E½; SW¼

IN TOWNSHIP 25 NORTH, RANGE 64 WEST OF THE 6th P.M.

Section 21: All
Section 22: S½
Section 28: All

8. That the Corn Creek Irrigation District be, and the same is hereby divided into five (5) Commissioner districts, described as follows:

Commissioner District No. 1 shall include all that portion of the Corn Creek Irrigation District which lies within Township 25 North, Range 64 West of the 6th P.M.; Township 24 North, Range 63 West of the 6th P.M.; and Township 24 North, Range 64 West of the 6th P.M. except for that portion of the District lying in Sections 28, 31, 32, and 33, Township 24 North, Range 64, West of the 6th P.M.

Commissioner District No. 2 shall include all that portion of the Corn Creek Irrigation District which lies within Sections 28, 31, 32 and 33, Township 24 North, Range 64 West of the 6th P.M.; all that portion of the District which lies within Township 24 North, Range 65 West of the 6th P.M.; and all that portion of the District which lies within Sections 4 and 5, Township 24 North, Range 64 West of the 6th P.M.

Commissioner District No. 3 shall include all that portion of the Corn Creek Irrigation District which lies within Township 23 North, Range 65 West of the 6th P.M.; and all that portion of the District which lies within Sections 6, 7, and the West half of Section 19, Township 23 North, Range 64 West of the 6th P.M.

Commissioner District No. 4 shall include all that portion of the Corn Creek Irrigation District which lies within Sections 15, 17, East one-half of Section 19, Sections 20, 21, 22, West one-half of Section 27 and Sections 28, 29 and 30 of Township 23 North, Range 64 West of the 6th P.M.

Commissioner District No. 5 shall include all that portion of the Corn Creek Irrigation District which lies within Sections 23, 24, 25, 26 and the East one-half of Section 27, Township 23 North, Range 64 West of the 6th P.M. and all that portion of the District which lies within Township 23 North, Range 63 West of the 6th P.M.

9. That the following freeholders are hereby appointed as Commissioners of the said Corn Creek Irrigation District:

Commissioner District No. 1: Gordon G. Booth
Commissioner District No. 2: Joel Teeters
Commissioner District No. 3: Albert Goertz
Commissioner District No. 4: Enoch Baumgardner
Commissioner District No. 5: Melvin R. Eaton

Said appointments to become effective upon their subscribing to the oath required by law and the making and filing with the Court their joint and several bond in the penal sum of $1,000.00 with sureties to be approved by the Court or the Judge thereof. Said Commissioners shall hold office until the 3rd Tuesday in February, 1979, and until their respective successors are qualified, and shall be at all times under the direction of this Court, and the Court reserves

the right to remove said Commissioners from office upon good cause shown after a hearing as provided by law, and to appoint a successor to such Commissioner so removed. Said Commissioners and their successors in office shall constitute the corporate authority of said Corn Creek Irrigation District and shall exercise the functions conferred on them by law and they shall with all convenient speed proceed to do the work and make the report required of them by law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that this finding, Order and Decree shall be final and conclusive upon all parties in interest unless appealed from to the Wyoming Supreme Court within thirty days after the same is filed in the office of the Clerk of this Court.

DONE IN OPEN COURT.

/s/ George P. Sawyer
Judge

No. 108. Original

In The Supreme Court

Of The United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,
v.
STATE OF WYOMING,
Defandant.

WYOMING BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

QUESTIONS PRESENTED

I. Whether there is a genuine issue as to any material fact with respect to Nebraska's claims for enforcement of the Decree and, if not, whether Wyoming is entitled to judgment as a matter of law on those claims.

II. Whether Wyoming is entitled to judgment as a matter of law confirming that Nebraska's right to North Platte River water under the Decree is limited to water required for irrigation of lands served by the canals specified in the Decree that divert at or upstream of Tri-State Dam.

PARTIES INVOLVED

The State of Nebraska initiated this lawsuit against the State of Wyoming. No claims have been asserted by or against the State of Colorado or the United States of America. Colorado was an impleaded defendant and the United States was an intervenor in the previous litigation that resulted in the Decree sought to be enforced in this case.

Motions to intervene have been filed by the National Audubon Society, Basin Electric Power Cooperative, Central Nebraska Public Power and Irrigation District, the Nebraska Public Power District and the Platte River Whooping Crane Habitat Maintenance Trust.

JURISDICTION

Nebraska and Wyoming invoke the Court's retained jurisdiction under Paragraph XIII of the Decree in *Nebraska v. Wyoming*, 325 U.S. 665, 671-72 (1945), as modified, *Nebraska v. Wyoming*, 345 U.S. 981 (1953).[1] The Decree was entered under Article III, Section 2, Clause 2, of the United States Constitution and the Judiciary Act, 28 U.S.C. § 1251(a) (1982). The Decree apportioned the natural flows of the North Platte River among Nebraska, Wyoming and Colorado for irrigation purposes. Nebraska's petition requests injunctive relief enforcing the Decree. Wyoming has counterclaimed, seeking injunctive relief enforcing the Decree against Nebraska.

[1] As used in this brief, the "Decree" refers to the 1945 decree (325 U.S. 665) as modified by the Court's 1953 order (345 U.S. 981).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution,
Article III, Section 2, Clause 2:

In all Cases affecting Ambassadors and other public Ministers and Consuls and those in which a State shall be a party, the Supreme Court shall have original jurisdiction.

Judiciary Act,
28 U.S.C. § 1251(a) (1982):

The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

STATEMENT OF THE CASE

Nebraska has invoked the Court's retained jurisdiction under Paragraph XIII of the Decree for the limited purpose of enforcing the Decree. Nebraska's petition alleges that certain actions in Wyoming violate or threaten to violate the Decree and should be enjoined. Wyoming has admitted the actions that Nebraska alleges. Wyoming denies, however, that those actions violate or threaten to violate the Decree. Wyoming Answer to Petition at 1-5. The question whether Nebraska is entitled to the relief requested in its petition is, therefore, a pure question of law that is appropriate for determination on summary judgment.

Nebraska's Motion for Leave to File Petition for an Order Enforcing Decree and for Injunctive Relief was filed on October 6, 1986. The Court granted Nebraska leave to file the petition. Wyoming then answered the

petition and, upon leave of the Court, filed a counterclaim.

The Decree places certain restrictions on diversions and storage of water from the North Platte River and its tributaries in each of the three states. Decree, paras. I-V. The purpose of those restrictions is to apportion the natural flow of the river during the irrigation season. The apportionment to Nebraska under the Decree is limited to irrigation water for Nebraska lands supplied by specified irrigation canals diverting from the North Platte River at or above Tri-State Dam.[2] Decree, para. V; *Nebraska v. Wyoming*, 325 U.S. 589, 625, 628, 654-55 (1945). A map of the North Platte River basin is included in the Appendix at A-1.

The Specific restrictions on use of water in Wyoming that the Court found necessary to protect Nebraska's apportionment under the Decree are as follows:

-- Exclusive of the Kendrick Project and Seminoe Reservoir, irrigation with water from the North Platte River above Guernsey Reservoir and its tributaries above Pathfinder Reservoir is limited to 168,000 acres, and storage of water for irrigation purposes from the North Platte River and its tributaries above Pathfinder Reservoir is limited to 18,000 acre-feet per year. Decree, para. II.

-- The relative priorities of the storage rights of the federal reclamation projects on the North

[2]References in this brief to canals diverting at or above Tri-State Dam include the Ramshorn Canal which historically diverted just below Tri-State Dam.

Platte River in Wyoming are fixed among themselves and in relation to the five specified canals serving Nebraska lands. Decree, paras. III, IV.

-- Wyoming is enjoined from diverting or using more than twenty-five percent (25%) of the natural flow in the Guernsey Dam to Tri-State Dam section of the river from May 1 to September 30 of each year; Nebraska is enjoined from diverting or using more than seventy-five percent (75%). Decree, para. V.

The Decree does not restrict diversion or storage in Wyoming for non-irrigation purposes and does not restrict diversions or storage from tributaries entering the North Platte below Pathfinder Dam. The Decree apportions only natural flow, not storage water. Decree, para. VI. It also affirmatively exempts from any restriction the use of water in Colorado and Wyoming for "ordinary and usual domestic, municipal and stock watering purposes and consumption". Decree, para. X. Paragraph XII(d) of the Decree provides that the Decree shall not affect "...[the] apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte River".

Nebraska asserts that Wyoming is violating or threatens to violate the Decree in four ways:

(1) By the operation of Grayrocks Reservoir on the Laramie River;

(2) By the proposed construction of new pumping, diversion and storage facilities near the confluence of the Laramie and North Platte Rivers;

(3) By the proposed construction of storage capacity on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir; and

(4) By actions to require the United States Bureau of Reclamation to obtain a Wyoming permit for diversion of water in Wyoming for storage in the Inland Lakes in Nebraska. Nebraska Petition, para. 3.

The record in this case, including the pleadings and affidavits, establishes the following undisputed facts concerning the actions of Wyoming that Nebraska alleges constitute violations or threatened violations of the Decree:

Grayrocks Reservoir

Grayrocks Reservoir was completed on the Laramie River mainstem northeast of Wheatland, Wyoming, in 1980 pursuant to Wyoming permits. It is used to supply the Laramie River Station, a large coal-fired steam electric power generating plant that was constructed at the same time. The reservoir and power plant were constructed by the Missouri Basin Power Project, a consortium of consumer-owned electric systems supplying power in eight states, including Nebraska and Wyoming. Basin Electric Power Cooperative ("Basin Electric") is the operator of the power plant and reservoir. Memorandum in Support of Motion of Basin Electric Power Cooperative for Leave to Intervene at 3. In 1978, Nebraska and several environmental groups filed lawsuits in the United States District Court in Nebraska challenging loan guarantees by the Rural Electrification Administration and issuance of a Section 404 dredge and fill permit by the Army Corps

of Engineers. They requested an injunction against construction of the reservoir and power plant on grounds of non-compliance with the National Environmental Policy Act, 42 U.S.C. §§ 4321-4361 (1982), and the Endangered Species Act, 16 U.S.C. §§ 1531-1542 (1982). The U.S. District Court entered the requested injunction. *Nebraska v. Rural Electrification Administration*, 12 E.R.C. 1156 (D. Neb. 1978).

While the case was pending on appeal to the Eighth Circuit Court of Appeals, the parties to the litigation entered an Agreement of Settlement and Compromise dated December 4, 1978, in which Nebraska withdrew "all objections" to issuance of the permit. Memorandum in Support of Motion of Basin Electric Power Cooperative for Leave to Intervene at 5-7. That agreement is reproduced in the Appendix at A-23 - A-31. It is referred to in this brief as the "Settlement Agreement". The Settlement Agreement provided for certain limitations on the operation of Grayrocks Reservoir and for limitations on total water depletions by the Laramie River Station. App. A-24 -A-28. Pursuant to the Settlement Agreement, the parties executed and filed with the Court of Appeals a stipulation dated February 20, 1979, which resulted in an order vacating the District Court's judgment and dismissing the case with prejudice, subject to the right of any party to "petition the District Court for interpretation and enforcement of any of the terms of the Agreement of Settlement and Compromise dated December 4, 1978." The stipulation and the order of the Eighth Circuit Court of Appeals are reproduced in the Appendix at A-19, A-32. Wyoming was not a party to the litigation or to the Settlement Agreement or stipulation.

Proposed Diversion and Storage Facilities Near the Confluence of the Laramie and North Platte Rivers (Corn Creek Project).

The Corn Creek Project is the only significant water development project currently proposed for construction near the confluence of the Laramie and North Platte Rivers. Affidavit of Gordon W. Fassett. The Corn Creek Project is a proposed project for irrigation of lands currently used for dryland farming and grazing in Goshen County, Wyoming. The current sponsor of the project is the Corn Creek Irrigation District, which was formed in 1978 under Wyoming law [WYO. STAT. §§ 41-7-201 to -210 (1977)]. The primary water supply for the project would be storage water supplied from Glendo Reservoir on the North Platte and from Grayrocks Reservoir on the Laramie to the District's pumping facilities at the mouth of the Laramie. In addition, the pending permit application requests the right to divert natural flow water from the Laramie River near its mouth. The Grayrocks Reservoir storage water would be delivered pursuant to an existing agreement between the District's predecessor, Corn Creek Reservoir Association, and Basin Electric Power Cooperative. Affidavit of Stanley K. Hathaway. That agreement is expressly recognized in the Grayrocks Reservoir Settlement Agreement. App., A-23 - A-31. The Glendo Reservoir water would be supplied under a proposed contract between the District and the Bureau of Reclamation. Such water would be part of Wyoming's annual allocation from Glendo Reservoir pursuant to the 1953 modification of the North Platte Decree. Decree, para. XVII (B); Affidavit of Gordon W. Fassett.

The Corn Creek Irrigation District was formed by

order of the District Court, Eighth Judicial District, Goshen County, Wyoming, entered January 20, 1978. *In Re the Corn Creek Irrigation District*, Civil Action No. 19-460 (Wyo. Dist. Ct. 1978). The State of Nebraska filed an Objection to Petition for Formation of Irrigation District, asserting that the proposed district would not have an adequate water supply because of Nebraska's asserted superior rights to Laramie River water under the Decree. Affidavit of Dorothy W. Fritz. After a two-day hearing on the petition, in which Nebraska participated by counsel, the district court entered its judgment and decree on January 20, 1978, establishing the District and determining:

> 3. That the State of Nebraska has no right to the waters in the Laramie River under the authority of the cases of *Wyoming v. Colorado*, 298 U.S. 573, 578 (1936), *Nebraska v. Wyoming*, 325 U.S. 589 (1945), and *Wyoming v. Colorado*, 353 U.S. 953 (1957), or under any other authority, law, statute or regulation of any nature whatsoever, and that it furthermore has no interest in the 10,600 acre feet of Glendo Unit Storage water of the Bureau of Reclamation which forms a part of the water supply for the Corn Creek Irrigation District, and therefore, the objection of the State of Nebraska to the formation of said District, be, and the same is hereby, denied.

Certified copies of the Petition for Formation of Irrigation District, Nebraska's objection and the Opinion and Order of the District Court are attached to the Affidavit of Dorothy W. Fritz. No appeal was taken from the district court's judgment. Affidavit of Dorothy W. Fritz.

Proposed Storage Facilities on Tributaries Between Pathfinder Reservoir and Guernsey Reservoir (Deer Creek Project)

Deer Creek Reservoir is the only water development project currently permitted for construction on any tributary entering the North Platte River between Pathfinder and Guernsey Reservoirs. It is a municipal storage project proposed to be constructed on Deer Creek, a tributary entering the North Platte River east of Casper, Wyoming. The sponsor of the project is the Wyoming Water Development Commission, an agency of the State of Wyoming. Affidavit of Michael K. Purcell.

Deer Creek Reservoir would, by exchange, provide a needed supplemental source of water for the City of Casper, whose current service area population is about 57,000, and for other smaller communities along the North Platte below Alcova Reservoir. Without the Deer Creek Project, Casper's existing water supply is inadequate in times of shortage. Affidavit of Michael K. Purcell. Wyoming has appropriated a total of $48.25 million for the Deer Creek Project. 1982 Wyo. Sess. Laws ch. 60; 1984 Wyo. Sess. Laws ch. 52; 1985 Wyo. Sess. Laws ch. 89. Approximately $2.1 million have been expended for studies, plans and specifications, final design, and right-of-way acquisition. Affidavit of Michael K. Purcell.

The design capacity of Deer Creek Reservoir is approximately 66,000 acre-feet. Its estimated annual yield is approximately 6,400 to 9,600 acre-feet.[3] Affidavit of Michael K. Purcell. The annual yield is highly

[3] The difference in yield estimates is due in part to the uncertainty regarding the priority and extent of the natural flow water rights used to supply the Inland Lakes.

dependent on carryover storage because of the variability of runoff in Deer Creek from year to year. Deer Creek Reservoir can only store water in excess of the requirements of existing downstream senior water rights that are entitled to water from Deer Creek. For that reason, it will store primarily in surplus water supply years and is unlikely to conflict with the water supply for the Nebraska canals specified in the Decree. Affidavit of Gordon W. Fassett.

On January 25, 1985, the Wyoming Water Development Commission applied to the U.S. Army Corps of Engineers for a dredge and fill permit for Deer Creek Reservoir under Section 404 of the Federal Water Pollution Control Act, 33 U.S.C. § 1344 (1982). A Draft Environmental Impact Statement (published September, 1986) for the Deer Creek Project has been prepared by the Corps of Engineers, Omaha District, and is currently in the public interest review process. Public hearings have been held in both Wyoming and Nebraska. Officials of the State of Nebraska have participated in the hearings. On July 20, 1987, the United States Fish and Wildlife Service issued its biological opinion concerning the effect of Deer Creek Reservoir on federally listed threatened and endangered species. That opinion concluded that construction and operation of Deer Creek Reservoir would not jeopardize the species nor adversely affect the critical habitat of the endangered whooping crane on the Platte River in central Nebraska if certain conservation measures are undertaken by Wyoming as provided in the agreement executed by Wyoming and the U.S. Fish and Wildlife Service. Affidavit of Michael K. Purcell.

Inland Lakes

Wyoming filed a lawsuit against the United States in the District Court for the Eighth Judicial District, Goshen County, Wyoming. *Wyoming ex rel. Christopulos v. United States*, Civil Action No. 23-13 (filed October 3, 1986). The complaint is reproduced in the Appendix at A-36 - A-44. That lawsuit, brought at the request of the Wyoming State Engineer, asks the court to declare that the Bureau of Reclamation must comply with Wyoming law in operating its North Platte Project facilities to divert water from the North Platte River in Wyoming to storage in four off-channel reservoirs in Nebraska known as the Inland Lakes. That suit seeks to enjoin such storage, including the storage of water out of priority in the Bureau's other reservoirs in Wyoming for the benefit of the Inland Lakes "until the defendants have complied with the laws of the State of Wyoming" and have obtained the permits required by Wyoming law. An order dated October 24, 1986, removed the case to the U.S. District Court for the District of Wyoming (Docket No. C86-0370-B). The federal defendants filed a motion to dismiss or in the alternative to stay the proceedings. By order dated March 27, 1987, the District Court denied the motion to dismiss and held that it had jurisdiction, but stayed the proceeding pending a determination of whether the same issues are before the Supreme Court in this case. A certified copy of the Order Staying Proceedings is reproduced in the Appendix at A-45.

Counterclaim

Wyoming filed a counterclaim alleging, *inter alia*, that Nebraska has violated the Decree (1) by demanding natural flow water for diversion in excess of the

beneficial use requirements of the canals entitled to water under the Decree and (2) by bypassing or diverting water from sources above Tri-State Dam to uses below Tri-State Dam that are not recognized or authorized by the Decree. Nebraska has generally denied the allegations in Wyoming's counterclaim. The counterclaim is based on those provisions of the Decree and the Court's opinion that limit Nebraska's rights to water supplies for lands irrigated by canals diverting at or upstream of Tri-State Dam. In its answer Nebraska does not deny that its rights are so limited.

SUMMARY OF ARGUMENT

Nebraska accuses Wyoming of violating the Decree and asks the Court to enjoin Wyoming's actions. Nebraska disavows any desire or attempt to modify the Decree. The facts underlying Nebraska's allegations are not in dispute. What is in dispute is the legal import of those facts under the Decree. That is a question of law that should be decided on summary judgment.

This Court, in its 1945 Decree in this case, determined that Nebraska has no right to water from the Laramie River, and accordingly excluded the Laramie River from the apportionment of the North Platte River. Therefore, Nebraska's assertion that actions on the Laramie River in Wyoming violate the Decree must be rejected as a matter of law. Furthermore, Nebraska is estopped to assert that either Grayrocks Reservoir or the proposed Corn Creek Project violates or threatens to violate the Decree. Nebraska withdrew all objection to Grayrocks Reservoir in an agreement that allowed construction of that reservoir to proceed and imposed specific limits on the operation of that reser-

voir. Nebraska's claim that the proposed Corn Creek Project would violate the Decree was litigated voluntarily by Nebraska in a Wyoming court. Nebraska did not appeal the final ruling against it, and it cannot relitigate that issue here.

Paragraph X of the Decree affirmatively exempts the development of municipal water supplies in Wyoming from any restriction. Nebraska's assertion that municipal projects such as Deer Creek Reservoir will violate the Decree is wrong because it ignores Paragraph X. Moreover, Deer Creek Reservoir will be located on a tributary that enters the North Platte River below Pathfinder Dam. The Decree does not restrict Wyoming's use of water from such tributaries.

This Court ruled in 1945 that the United States Bureau of Reclamation must comply with state law in appropriating water for its North Platte Project. Wyoming's lawsuit against the Bureau seeks a determination of whether the Bureau has proceeded in compliance with Wyoming law in appropriating water for storage in the Inland Lakes and, if not, what it must do to comply with Wyoming law. Wyoming has a need and a right to have that matter finally determined. The mere bringing of the lawsuit to obtain that determination does not violate the Decree. The lawsuit should be allowed to proceed.

For these reasons, Nebraska's petition for enforcement of the Decree and for injunctive relief should be denied. Trial of the remaining Wyoming counterclaim may be greatly simplified by a partial summary judgment confirming that Nebraska's rights under the Decree are limited to use on lands irrigated by water diverted from the North Platte at or upstream of Tri-

State Dam. Even if the Court decides that trial on some or all of Nebraska's claims is necessary, a determination of the extent of Nebraska's rights under the Decree would limit the issues and expedite trial preparation. The Court, over Nebraska's objection, expressly ruled in its 1945 opinion that "equitable apportionment does not permit Nebraska to demand direct flow water from above Whalen for use below Tri-State...". *Nebraska v. Wyoming*, 325 U.S. 589, 628 (1945).

ARGUMENT

I. THE MATERIAL FACTS CONTROLLING THE QUESTIONS OF LAW ARE UNDISPUTED, AND AND WYOMING IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON NEBRASKA'S CLAIMS FOR ENFORCEMENT OF THE DECREE.

Nebraska's petition for enforcement of the Decree raises no genuine issue of material fact that would require a trial. The parties do not dispute the facts as to the actions in Wyoming that Nebraska asserts have violated or threaten to violate the Decree. The sole question is whether those actions, which are admitted by Wyoming, constitute a violation or threatened violation of the Decree. This motion asks the Court to determine that question of law on summary judgment.

Under FED. R. CIV. P. 56, which is made applicable in this proceeding by SUP. CT. R. 9.2, summary judgment is the proper remedy where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See generally Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505 (1986). Here, the material facts are not in dispute.

While there may be questions of interpretation of the Decree, those are questions of law that may be decided without a trial. *See, e.g., United States v. California*, 332 U.S. 19, 24 (1947) (original jurisdiction case in which dispute over ownership of the three-mile marginal ocean belt off the California coast was decided as a matter of law on United States motion for judgment without taking of evidence); *California ex rel. State Land Commission v. United States*, 457 U.S. 273 (1982) (original jurisdiction case in which dispute regarding title to accreted ocean front land was decided as a matter of law on cross-motions for summary judgment and for judgment on the pleadings without taking of evidence).

The actions and proposed actions in Wyoming of which Nebraska complains do not violate or threaten to violate the Decree. Therefore, as a matter of law, Nebraska is not entitled to the injunctive relief it seeks.

A. *Neither Grayrocks Reservoir Nor the Proposed Corn Creek Project Violates the Decree Because the Decree Does Not Restrict the Use of Laramie River Water in Wyoming.*

1. *The Court has already determined in this case that Nebraska has no right to waters of the Laramie River.*

Nebraska's claim to Laramie River water was fully litigated by the parties and rejected by the Court in the previous litigation in this case. The Special Master concluded:

> The water of the Laramie River was equitably distributed by the decision of this Court in the case of *Wyoming v. Colorado*, 259 U.S. 419, and that of the South Platte River was equitably distributed by compact between Nebraska and Colorado ratified by the Congress in 1926. This conclusion takes into account the interests of all parties and no redistribution of the waters of those rivers should be undertaken in this suit.

Special Master's Report at 8, *Nebraska v. Wyoming*, 325 U.S. 589 (1945). The Court confirmed the Special Master's conclusion and said:

> The waters of the South Platte and the Laramie were previously apportioned -- the former between Colorado and Nebraska by compact, the latter between Colorado and Wyoming by decree. Those apportionments are in no way affected by the decree in this case.

Nebraska v. Wyoming, 325 U.S. at 592 n.1 (citations omitted). Furthermore, the Decree itself provides that it shall not affect "the apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte River." Decree, para. XII(d).

In these conclusions, the Court and the Special Master were merely giving effect to the previous decree of apportionment in *Wyoming v. Colorado*, 259 U.S. 419 (1922), *modified*, 260 U.S. 1 (1922). The 1922 decree had been construed by the Supreme Court as confirming "the right of the State of Wyoming and her water claimants to receive and divert within that State the remaining waters of the stream and its tributaries . . .". *Wyoming v. Colorado*, 298 U.S. 573, 578 (1936).

Nebraska's claim to waters of the Laramie River

was squarely framed in the pleadings and briefs in the previous litigation in this case. In response to Nebraska's original Bill of Complaint, Colorado asserted that the waters of the Laramie River "were and are fully and completely divided and apportioned" between Wyoming and Colorado and therefore Nebraska should have no relief extending to the Laramie River. Colorado Answer and Cross-Bill at 33, *Nebraska v. Wyoming*, 325 U.S. 589 (1945). Wyoming admitted that the Laramie River had historically contributed water to the North Platte River but joined Colorado in the assertion that the Laramie River had been fully apportioned between Wyoming and Colorado by the prior decree. Wyoming Answer to Colorado Cross-Bill at 9-10, *id.*

In response, Nebraska admitted only that the Supreme Court had adjudicated the relative rights of Wyoming and Colorado in the Laramie River. Nebraska asserted that, not having been party to the Laramie River litigation, it was not bound by the Laramie River decree and that its claim to water from the Laramie River had never been settled or adjudicated. Nebraska Answer to Colorado Cross-Bill at 8-9, *id.*

There was a considerable amount of evidence presented to the Special Master concerning the contribution of the Laramie River to the North Platte River. *See*, for example, the testimony of Nebraska's witness R. I. Meeker, Record at 133, 176; Wyoming Exhibit Nos. 112, 173; Special Master's Report at 269-71, *id.*

In its brief before the Special Master, after close of the evidence, Nebraska maintained the position that it was not bound by the previous decree apportioning the Laramie. Nebraska Opening Brief Before Special Master at 43, *id.* Both Wyoming and Colorado urged the

Special Master to exclude the Laramie River from any apportionment in this case. Wyoming Opening Brief Before Special Master at 138-39, 401, *id.*; Colorado Opening Brief Before Special Master at 10, 64-65, 217-18, *id.* Both also noted that Nebraska's own witness R. I. Meeker had testified that the dependable flow of the Laramie River reaching the North Platte River was "negligible" during times of shortage in the irrigation season. Wyoming Opening Brief Before Special Master at 141-42, *id.*; Colorado Opening Brief Before Special Master at 207, *id.*

In his recommendations for a decree, the Special Master specifically excluded the Laramie River from the proposed apportionment. Special Master's Report at 177, *id.* Nebraska did not take exception to the Special Master's exclusion of the Laramie River from the apportionment and the Court adopted the Special Master's proposal.

Nebraska's suggestion that the Master and the Court intended to include the Laramie River in the 75/25 division of natural flow conflicts with the plain language of the Master's Report, the opinion and the Decree. The Master's and the Court's intent to exclude the Laramie is further evidenced by the exclusion of Laramie River acreage from the irrigated acreage and water requirement figures that formed the basis for the 75/25 apportionment. Moreover, that apportionment applies only to water that reaches the North Platte in the Whalen to Tri-State section. Nebraska's claim asserts, in effect, that the Decree prohibited any increase in Wyoming consumptive uses of the Laramie after 1945 in order to insure maintenance of the then-existing inflows from the Laramie to the North Platte. On the contrary, the Decree does not restrict

future Wyoming uses of Laramie River water. Again, the Special Master, the Court and the parties did not consider the Laramie to be a significant source of the supply available to Nebraska from the North Platte.

The Court's conclusion that the Laramie River was fully apportioned between Colorado and Wyoming was a final adjudication of that issue. It bars Nebraska from now asserting that any use of the Laramie River by Wyoming violates the Decree or otherwise interferes with Nebraska's right to an equitable portion of the waters of the North Platte River. *Arizona v. California*, 460 U.S. 605 (1983) (fact that decree of Supreme Court in original jurisdiction had retained jurisdiction to accommodate changed conditions did not affect finality of determination of specific water rights in first proceeding).

2. *Even if Nebraska had an equitable right to Laramie River water, it is estopped to assert that operation of Grayrocks Reservoir violates that right.*

Nebraska is a party to the Settlement Agreement which allowed construction of Grayrocks Reservoir to proceed. Construction of the reservoir and the Laramie River Station, at a cost of approximately $1,340,000,000 was able to be completed because the Settlement Agreement provided for removal of the injunction against construction issued by the District Court at the request of Nebraska and others. Memorandum in Support of Motion of Basin Electric Power Cooperative for Leave to Intervene at 3-7.

Although not specifically raised in Nebraska's lawsuit as a ground of opposition, one of Nebraska's objections to the construction of Grayrocks Reservoir

was Nebraska's claim that construction and operation of the reservoir would interfere with Nebraska's right to water from the Laramie River. *See* Reply to Wyoming's Brief in Opposition to Motion for Leave to File Petition at 3, 10-12. In the Settlement Agreement, Nebraska agreed to specific operational limits on the Grayrocks Reservoir and withdrew all objections it had to the federal actions required to allow construction of the reservoir to proceed. App., A-29. Equity surely requires that Nebraska now be estopped to assert that construction or operation of Grayrocks Reservoir consistent with the Settlement Agreement violates its rights. *See generally Dickerson v. Colgrove*, 100 U.S. 578 (1879); *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959).

Nebraska attempts to escape this estoppel in its Reply to Wyoming's Brief in Opposition to Motion for Leave to File Petition. There it said that, despite the plain language of its petition, what it really is complaining about is not the operation of Grayrocks Reservoir, but rather "threats" by Wyoming to allow Wyoming appropriators to divert from the Laramie River the water that is bypassed or released by Grayrocks Reservoir under the Settlement Agreement. At the same time, however, Nebraska admits that Wyoming is not a party to, and therefore is not bound by, the Settlement Agreement. Reply to Wyoming's Brief in Opposition to Motion for Leave to File Petition at 12.

Wyoming has stated, and reiterates here, that it has administered, and will in the future administer, the water rights for Grayrocks Reservoir according to Wyoming law. *See* Wyoming Answer to Petition, para. 3(a); Affidavit of Gordon W. Fassett. Nebraska has not disputed that fact. The adjudicated water right for

Grayrocks Reservoir does not provide for the use of water to maintain flows in the Laramie or for any uses in Nebraska. Affidavit of Gordon W. Fassett. Accordingly, under Wyoming law, any water in the Laramie River below Grayrocks Reservoir may be used by Wyoming appropriators.

Nebraska's argument implies that there is a direct conflict between Wyoming law and the provisions of the Settlement Agreement. Wyoming disagrees, but even assuming such a conflict exists, Wyoming water officials are not free to ignore Wyoming law. Certainly the Decree does not require this. In fact the Decree expressly leaves the intrastate administration of water rights to the respective, individual states. Decree, para. XII(a). The Court's desire to leave each state with "full freedom of intrastate administration of her share of the water" was one of the primary reasons for rejection of Nebraska's proposal for a strict interstate priority schedule. *Nebraska v. Wyoming*, 325 U.S. 589, 643 (1945).

In summary, Nebraska's vague accusations that Wyoming intends "to subvert" and "to act in derogation of" the Decree by its actions with respect to Grayrocks Reservoir have no support in the facts or the law. The Decree has nothing to do with Grayrocks Reservoir or the Settlement Agreement. The Decree expressly does not affect the Laramie River and it leaves Wyoming free to administer Laramie River water rights as its law requires.

3. *Nebraska is bound by a prior judicial determination that it has no right to Laramie River water that would be affected by the Corn Creek Project.*

Nebraska appeared as an objector in the proceed-

ings in the Wyoming court for the formation of the Corn Creek Irrigation District for the purpose of constructing and operating the Corn Creek Project. Affidavit of Dorothy W. Fritz. Nebraska placed in issue there the very claim it raises here -- that the depletions by the project would violate Nebraska's rights under the North Platte Decree. Nebraska argued that because it had a prior right to Laramie River waters, there would be insufficient water available for the Corn Creek Project. *See* copy of Objection, Exhibit B to the Affidavit of Dorothy W. Fritz. Nebraska had a full and fair opportunity to litigate that issue. The court squarely held that Nebraska had no legitimate claim to Laramie River water under the North Platte Decree. *See* copy of Order, Exhibit C to the Affidavit of Dorothy W. Fritz. Because Nebraska's claim questioned the feasibility of the project, Wyoming law required the Court to decide the issue in determining whether to grant the petition for formation of the District. WYO. STAT. §§ 41-7-201 to -210 (1977); *In Re Washakie Needles Irrigation District*, 52 Wyo. 518, 76 P.2d 617 (1938). Nebraska did not appeal from the court's judgment and therefore is bound by it. Affidavit of Dorothy W. Fritz; *Illinois v. Michigan*, 409 U.S. 36, 37 (1972).

Nebraska freely chose to present that issue to the state court in Wyoming and freely chose not to appeal the ruling against it. As the Supreme Court said of the United States' attempt to relitigate a matter previously determined in a state court, "[c]onsiderations of comity as well as repose militate against redetermination of issues in a federal forum at the behest of a plaintiff who has chosen to litigate them in state court." *Montana v. United States*, 440 U.S. 147, 163 (1979). *See generally Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

B. *Municipal Water Development on the Tributaries Entering the North Platte River Between Pathfinder Reservoir and Guernsey Reservoir, Such as the Proposed Deer ~~Corn~~ Creek Reservoir, Does Not Violate the Decree.*

Deer Creek Reservoir is the only significant water development project currently permitted for future construction on any tributary entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir. Affidavit of Gordon W. Fassett. The allegation in Nebraska's petition regarding the "proposed construction of storage capacity on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir" refers to Deer Creek Reservoir. Reply to Wyoming's Brief in Opposition to Motion for Leave to File Petition at 5. If Nebraska's petition is intended to refer to any future water development on those tributaries, other than Deer Creek Reservoir, the arguments in this brief apply with equal force to such future development.

There is no dispute that Wyoming proposes to build Deer Creek Reservoir and that Deer Creek Reservoir will result in certain depletions to the flow of the North Platte River. Wyoming Answer, para. 3(c). Wyoming estimates that the average annual yield of Deer Creek Reservoir ultimately will be from 6400 to 9600 acre-feet. Affidavit of Michael K. Purcell.

The precise amount and timing of depletions to the North Platte River from operation of Deer Creek Reservoir are not stated in the pleadings or affidavits. Wyoming has conducted detailed studies which predict

the amount and timing of depletions to the North Platte River from Deer Creek Reservoir and Wyoming has provided the results of those studies to Nebraska through the public review process on the § 404 permit application and the Environmental Impact Statement. Affidavit of Michael K. Purcell. Nebraska disputed the results of those studies in its comments on the Draft Environmental Impact Statement. Nebraska alleged that depletions to the North Platte River from Deer Creek Reservoir could be as much as 25,000 acre-feet annually. Even if that fact issue is still in dispute, it is immaterial to the question of whether Deer Creek Reservoir violates the Decree. The mere existence of disputed issues of fact that are not material cannot defeat Wyoming's entitlement to judgment as a matter of law that construction and operation of Deer Creek Reservoir will not violate the Decree. Only if there were genuine issues of *material* fact would the Court be required to conduct a trial. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2510 (1986).

Here, Wyoming has a right under the Decree to construct Deer Creek Reservoir regardless of the precise amount and timing of its depletions to the North Platte River. Any dispute about those depletions therefore is not material to this case. It may be material to the environmental disclosures required in the Environmental Impact Statement process and to the public interest review required in the § 404 permit process, but it is irrelevant to the question whether Deer Creek Reservoir violates the Decree.

As a matter of law, the construction and operation

of a municipal water storage project, such as Deer Creek Reservoir, on a tributary entering the North Platte River between Pathfinder and Guernsey Reservoirs will not violate the Decree for two reasons: (1) the Decree does not restrict Wyoming's right to develop water resources on tributaries below Pathfinder Reservoir, and (2) the Decree affirmatively exempts ordinary and usual municipal uses from its operation.

1. *The Decree does not restrict Wyoming's use of water for any purpose from tributaries entering the North Platte River below Pathfinder Reservoir.*

The Decree places specific restrictions on the diversion, storage and use of water in each of the three states. None of those restrictions applies to Wyoming's use of water from the tributaries entering the North Platte River below Pathfinder Reservoir. Wyoming's use of water from those tributaries cannot, as a matter of law, violate the Decree.

The absence of restriction on the tributaries between Pathfinder and Guernsey Reservoirs was not an oversight. Nor can Nebraska argue that any restriction on those tributaries is implicit in the Decree. The Special Master concluded that regulation of the tributaries, even considering the water supply during the 1931-1940 extreme drought period, was unjustified because:

> On the tributary streams the runoffs are of shorter duration even than those above Pathfinder. The flows reach their peak in May, fall off rapidly during June, and usually run dry by the first of July, before there is a serious

> shortage of water in the river. There are hundreds of small diversions on these tributaries, regulation of which could be of little, if any, benefit to the river below.

Special Master's Report at 52, *Nebraska v. Wyoming*, 325 U.S. 589 (1945) (footnotes omitted).

In the Decree the Court retains jurisdiction to address, *inter alia*, "the question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir." Decree, para. XIII(c). Although Nebraska has invoked the Court's retained jurisdiction under Paragraph XIII of the Decree, it has emphatically stated that it has done so for the sole purpose of enforcing the Decree and not for modifying the Decree in any way, and has not alleged changed conditions suggesting the need for any modification. Reply to Wyoming Brief in Opposition to Motion for Leave to File Petition at 2; Nebraska's Memorandum in Opposition to the Motion of Platte River Trust for Leave to Intervene at 3. Because the Decree does not restrict Wyoming's use of water from the tributaries between Pathfinder and Guernsey Reservoirs, Nebraska's request to enforce the Decree against such use must be denied as a matter of law.

2. *Wyoming's apportionment under the Decree includes the right to build and operate projects such as Deer Creek Reservoir for ordinary and usual municipal uses.*

In the previous litigation in this case, the parties agreed that "there should be no restriction upon the diversion from the North Platte River in Colorado or

Wyoming of water for ordinary and usual domestic and municipal purposes and consumption and that nothing in the recommended decree is intended to or will interfere with such diversions and uses." *Nebraska v. Wyoming*, 325 U.S. at 656. The Court adopted that provision and extended it to the tributaries at Wyoming's suggestion. *Id.* That resulted in a separate provision of the Decree affirmatively providing that the Decree "shall not affect or restrict" ordinary and usual domestic and municipal uses. Decree, para. X.

It is undisputed that Deer Creek Reservoir will be used to provide a municipal water supply for the City of Casper and other small municipalities along the North Platte River below Alcova Reservoir. The City of Casper needs Deer Creek Reservoir in order to provide an adequate, reliable supply of water to its present population. Affidavit of Michael K. Purcell.[4] The municipal use of water from Deer Creek Reservoir is also ordinary and usual. There is no suggestion in the Court's opinion or Decree that the words "ordinary and usual municipal use" were intended to have a meaning other than their ordinary meaning in common usage. They obviously refer to any commonly occurring use of water by a municipal entity in providing a water supply to its citizens and customers. *See generally* 2 C. Kinney, *Law of Irrigation and Water Rights*

[4]The water from Deer Creek Reservoir will not be delivered directly to the City of Casper's water diversion facilities. Rather, the primary use of the reservoir will be to release water through Deer Creek to the North Platte River below Casper's diversion works as a substitute supply to allow Casper to deplete the North Platte River by an equivalent amount. Affidavit of Michael K. Purcell. The important point, however, is that Deer Creek Reservoir will be used to supply water to the municipalities and such use therefore is a municipal use. Water available from the reservoir in excess of municipal needs will be temporarily used to supply non-municipal uses.

1200 (2d ed. 1912); 1 R. Clark & C. Martz, *Waters and Water Rights* § 54.3 (1967).

At the time of the Special Master's Report and Decree, the laws of both Wyoming and Colorado specifically recognized that inherent in a municipal water right is the right and the need to expand the use to accommodate growth of the municipality. *Holt v. City of Cheyenne*, 22 Wyo. 212, 137 P. 876 (1914); *City and County of Denver v. Sheriff*, 105 Colo. 193, 96 P.2d 836 (1939). Nebraska law is in accord. *See Metropolitan Utilities District of Omaha v. Meritt Beach Co.*, 179 Neb. 783, 800, 140 N.W.2d 626, 637 (1966) (municipality permitted to supplement its water supply with ground water from Platte River alluvial well field, since "use of ground water by the inhabitants of a city for the purpose of health, convenience, and comfort is a public use of such water", citing *Olson v. City of Wahoo*, 124 Neb. 802, 248 N.W. 304 (1933)). Nebraska law allows appropriators, including municipalites, to store unappropriated waters in surface reservoirs or to divert such waters to recharge ground water supplies. NEB. REV. STAT. § 46-241 (1943, Reissue 1984). Wyoming's use of Deer Creek Reservoir to supply the needs of Casper and other municipalities would be considered an ordinary and usual municipal use under Nebraska law. In any event, it is precisely the type of use contemplated by Paragraph X of the Decree.

Nebraska asks the Court to enforce the Decree to restrict or limit Wyoming's development of municipal uses such as Deer Creek Reservoir. The relief requested by Nebraska is so plainly contrary to Paragraph X of the Decree that it must be denied as a matter of law.

There is no reasonable construction of the Decree that would allow Nebraska to invoke the Court's retained jurisdiction under Paragraph XIII to restrict or limit a municipal use that is expressly exempt from such restriction by Paragraph X of the Decree. The Decree must be read and construed in its entirety to give effect to all of its provisions. Nebraska's interpretation of the Decree disregards Paragraph X.

The Decree, in effect, apportioned to Colorado and Wyoming the right to use water from the North Platte and its tributaries for future ordinary and usual domestic and municipal uses without restriction. To restrict municipal use now would be to effect a new apportionment and to substantially modify the Decree. Nebraska cannot have such relief in a suit to *enforce* the Decree.

The Decree's treatment of municipal uses is consistent with both common sense and principles of certainty and finality. Although subject to administration in the priority system like other water rights, domestic uses (both private and municipal) are generally recognized to be preferred uses, as they are by Nebraska, Wyoming and Colorado. NEB. CONST. art. XV, § 6; NEB. REV. STAT. §§ 46-204, 46-613, 46-648 (Reissue 1984); WYO. STAT. § 41-3-102 (1977); COLO. CONST. art. XVI, § 6. *See also Connecticut v. Massachusetts*, 282 U.S. 660, 673 (1931).[5] The express affirmative exemption of municipal uses by a separate article of the Decree reflects intent that future expansion of such uses not be limited and that such uses be treated differently than irrigation uses for purposes of the Court's retained jurisdiction. Otherwise, Paragraph X would be superfluous.

[5] There, Connecticut asserted that any further reduction in the flow of the Connecticut River would injure its vested rights. The Boston area faced a serious water shortage. Denying the injunction sought by Connecticut, the Court said:

> [T]his Court will not exert its extraordinary power to control the conduct of one State at the suit of another, unless the threatened invasion of rights is of serious magnitude and established by clear and convincing evidence ... Drinking and domestic purposes are the highest uses of water. An ample supply of wholesome water is essential.

282 U.S. at 669, 673.

Nebraska agrues that Wyoming's interpretation of Paragraph X of the decree would "gut the underlying apportionment for irrigation expressed in the Decree" by allowing municipal uses in Wyoming and Colorado potentially to deplete the entire flow of the North Platte. Reply to Wyoming's Brief in Opposition to Motion for Leave to File Petition at 14. Paragraph X of the Decree reflects the special Master's and the Court's recognition that future domestic and municipal uses in the sparsely populated North Platte basin in Wyoming and Colorado would not be large enough to threaten Nebraska's apportionment for irrigation. The operation of the priority system to protect existing senior rights under Wyoming and Colorado law greatly limits the potential for increased depletions of North Platte River flows by future municipal use.

Wyoming believes that Deer Creek Reservoir poses no threat to Nebraska's apportionment. While Nebraska may disagree, it has not alleged facts that, if proved, would support a finding of threat of injury to its canals in the Whalen to Tri-State section, which are its only rights under the Decree.

The Court's treatment of municipal uses is also consistent with its reluctance in the earlier opinion and

Decree to interfere with uses of water in Wyoming more than necessary to prevent the injury that Nebraska alleged had occurred during the 1930's drought period. Both the Special Master and the Court questioned whether Nebraska had demonstrated any threat of injury under average water supply conditions. They pointed out that the Decree was intended to address the conditions of the severe drought of the 1930's and that, if water supply conditions returned to normal, perhaps no restriction would be needed.[6] Special Master's Report at 10-11, 119-22, *Nebraska v. Wyoming*, 325 U.S. 589, 610, 620 (1945).

It is not possible for the Court to both grant the relief requested by Nebraska and give effect to Paragraph X of the Decree. Wyoming is entitled to a judgment determining as a matter of law that the Decree allows Wyoming to construct and operate municipal water development projects such as Deer Creek Reservoir. Certainty and finality regarding this issue are essential for municipal water supply planning in the North Platte basin in Wyoming.

C. *Wyoming's Suit to Require the United States Bureau of Reclamation to Obtain Wyoming Permits for Storage in the Inland Lakes Does Not Violate the Decree.*

The only "action" that threatens in any way to affect the storage of water in the Inland Lakes is the lawsuit that Wyoming filed in the Wyoming court against the Bureau of Reclamation and other federal agencies and officials. The complaint seeks an injunc-

[6] The *Nebraska v. Wyoming* opinion was a five to three decision with one justice not participating. The three dissenting justices believed that no restrictions against Wyoming were necessary or justified. *Nebraska v. Wyoming*, 325 U.S. 589, 664 (1945) (Roberts, Frankfurter and Rutledge, JJ., dissenting).

tion against the storage of water in the Inland Lakes until the United States has obtained the requisite Wyoming permit. However, Wyoming has agreed that, during the pendency of the litigation involving the Inland Lakes, it will not interfere with storage of water for the Inland Lakes under certain criteria agreed to among Nebraska, Wyoming and the Bureau of Reclamation. *See* Affidavit of Gordon W. Fassett and copy of 1987 North Platte River Ownership and Natural Flow Accounting Procedures attached thereto as Exhibits A and B.

The Wyoming lawsuit was originally filed in the Wyoming District Court in Torrington, Wyoming. It subsequently was removed, upon motion by the federal defendants, to the Federal District Court for Wyoming. The federal court denied the federal defendants' motion to dismiss and held that it had jurisdiction, but stayed proceedings pending a determination of whether the same issues will be litigated in this original action. A certified copy of the Order Staying Proceedings is reproduced in the Appendix at A-45.

This Court unquestionably decided in the earlier litigation in this case that Section 8 of the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. § 383 (1982), requires the Bureau of Reclamation to proceed in conformity with state water laws in constructing and operating its projects. *Nebraska v. Wyoming*, 295 U.S. 40, 42 (1935); *Nebraska v. Wyoming*, 325 U.S. 589, 612-15, 629 (1945). *See also California v. United States*, 438 U.S. 645 (1978). Nebraska affirmatively argued that point in the earlier litigation and cannot now take a contrary position. Answer Brief of State of Nebraska, Complainant, to Brief of United States Before Special Master, *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Edwards v.*

Aetna Life Insurance Co., 690 F.2d 595 (6th Cir. 1982) ("judicial estoppel" applied to bar party from asserting inconsistent position where court had previously ruled in that party's favor). Wyoming is entitled to judicial confirmation that Section 8 of the Reclamation Act still applies in Wyoming, and that the Bureau of Reclamation may not continue to disregard Wyoming law. It cannot be seriously argued that Wyoming's effort to obtain such a judicial determination constitutes a violation of the Decree.

Assuming that Section 8 of the Reclamation Act still applies in Wyoming, the question presented in the Wyoming la· ·uit is whether the Bureau has proceeded in conformi, with Wyoming law and, if not, what it must do to comply with Wyoming law. Those are issues of state law and it is not appropriate or efficient for the Supreme Court to attempt to resolve those in the first instance. *Arkansas v. Texas*, 346 U.S. 368 (1953). The Wyoming court is competent to decide such questions of Wyoming law but, where the United States has exercised its right to remove the case to federal court, the federal court is competent to, and in fact has a duty to, interpret and apply the state law as well. *Arizona v. Maypenny*, 451 U.S. 232 (1981). *See generally Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

Nebraska suggests that the Bureau of Reclamation has a right to the storage of water for Inland Lakes under the Decree that exempts it from compliance with Wyoming law. Even assuming *arguendo* that Nebraska's argument is correct, there is no reason that the federal court cannot give full effect to the Supreme Court's Decree or any other principle of federal law that may be involved. Nebraska is incorrect in its insistence that it must be a party to the controversy

over the extent of the Bureau's rights simply because the case may involve interpretation and application of the Supreme Court's Decree. *See Hinderlider v. La Plata River and Cherry Creek Ditch Co.*, 304 U.S. 92, 110-11 (1938) (absence of signatory states as parties in suit to interpret and enforce apportionment compact held no bar to jurisdiction over the action).

The Bureau is the owner and operator of the North Platte Project for the benefit of the irrigators under the project. *Nebraska v. Wyoming*, 325 U.S. 589, 614 (1945). The Bureau has an obligation to secure the water rights for the project for the benefit of those irrigators. *Nevada v. United States*, 463 U.S. 110, 126-28 (1983). If the irrigators under the North Platte Project in Nebraska believe that their rights are not adequately protected by the Bureau, they are free to seek intervention in the case pending in federal court in Wyoming.

The Wyoming lawsuit seeks a determination of specific water rights and involves a limited, specific group of water users in Nebraska. Since those water users' interests can be adequately protected by the Bureau of Reclamation or by their own participation, there is no need for Nebraska to appear for them in the role of *parens patriae*. The mere fact that the case may involve interpretation and application of this Court's Decree requires neither that Nebraska be made a party nor that the Supreme Court exercise its original jurisdiction to preempt the litigation.

The Decree apportioning the North Platte River is an important, if not dominant, part of the law of the river. Any litigation concerning water rights on the North Platte River might involve interpretation and application of the Decree. A rule requiring the Sup-

reme Court to exercise its original jurisdiction whenever litigation, even among private parties, raises a question of interpretation or application of the Decree would not serve the interests of justice or sound judicial administration. It is entirely appropriate for state courts and lower federal courts to decide such questions in the first instance. The parties have recourse to the Supreme Court through the normal appellate process if they believe the lower court has erred in interpreting or applying the Decree. *See Hinderlider v. La Plata River and Cherry Creek Ditch Co.*, 304 U.S. 92 (1938). If Nebraska believes that the ultimate outcome of that pending litigation to which it is not a party affects its apportionment under the Decree, it may then seek to invoke this Court's retained jurisdiction to consider such changed conditions.

The question that the Court must address is whether the Wyoming lawsuit itself violates the Decree. Surely it does not. The Bureau's refusal to apply for permits required by Wyoming law has caused uncertainty regarding the Bureau's operation of its North Platte Project to supply the Inland Lakes and regarding the effect of such operation on other Wyoming water rights. Without such permits, Wyoming water officials are unable properly to carry out their statutory duties to administer water rights in the North Platte River. Affidavit of Gordon W. Fassett. Wyoming's attempt to remove that uncertainty by requiring the Bureau of Reclamation to comply with Section 8 of the Reclamation Act and obtain Wyoming permits is not a violation of the Supreme Court's Decree.

There being no genuine issues of material fac .t dispute concerning the action Wyoming has taken, this

Court should rule as a matter of law that the Wyoming lawsuit does not violate the Decree and should direct the federal district court in Wyoming to proceed with the case.

II. NEBRASKA'S RIGHTS UNDER THE APPORTIONMENT PROVIDED BY THE DECREE ARE LIMITED TO WATER SUPPLIES FOR LANDS IRRIGATED BY CANALS DIVERTING AT OR UPSTREAM OF TRI-STATE DAM.

Nebraska's pleadings do not describe any specific water rights, category of water rights or geographic area that Nebraska believes are injured by the Wyoming actions alleged in the Petition. To the extent that Nebraska seeks to enforce the Decree against Wyoming for the benefit of uses supplied by diversions below Tri-State Dam, the relief it claims is clearly beyond the scope and intent of the Decree and should be denied as a matter of law. Even if it were concluded that there are factual issues requiring a trial, partial summary judgment defining the limits of Nebraska's rights under the Decree would clarify the issues for such a trial and provide for more efficient trial preparation.

If, as Wyoming contends, it is *res judicata* that Nebraska's rights under the Decree are limited to uses of water diverted at or above Tri-State Dam, this proceeding will be simpler and less costly than otherwise. It would not be necessary for the parties to conduct pre-trial investigations nor to introduce evidence regarding surface and ground water resources and uses in the North Platte and Platte River basins in central Nebraska. It also would be unnecessary for the Court to consider uses of Platte River water to provide

flows for maintenance of the migratory bird habitat in the "Big Bend" reach of the Platte River as has been claimed by the National Audubon Society and the Platte River Whooping Crane Habitat Maintenance Trust, who seek to intervene. That matter would be determined as an intrastate matter among Nebraska interests.

The question of the limits of Nebraska's rights under the Decree is also raised by Wyoming's counterclaim. Wyoming asserts, *inter alia*, that Nebraska has violated the Decree (1) by demanding natural flow water for diversion in excess of the beneficial use requirements of the canals entitled to water under the Decree and (2) by bypassing or diverting water from sources above Tri-State Dam to uses below Tri-State Dam that are not recognized or authorized by the Decree. Wyoming Counterclaim, para. 2. Nebraska has denied those actions and has generally denied any violation of the Decree.

The question of the extent of Nebraska's rights under the Decree is a question of interpretation of the Decree that can be decided as a matter of law. While there may be disputed issues of fact as to whether and how much water has been diverted to uses below Tri-State, the basic legal question of whether Nebraska is entitled under the Decree to demand water for such uses is ripe for determination. A ruling on that legal question will simplify and clarify the factual issues raised by Wyoming's counterclaim. Such a procedure was employed in *United States v. California*, 332 U.S. 19, 26 (1947), where the Court, in an original action, upon motion for judgment filed by the United States, determined as a matter of law the basic legal issue of ownership of the three-mile marginal ocean belt.

There, the Court recognized:

> And there is no reason why, after determining in general who owns the three-mile belt here involved, the court might not later, if necessary, have more detailed hearings in order to determine with greater definiteness particular segments of the boundary. *Oklahoma v. Texas*, 258 U.S. 574, 582. Such practice is commonplace in actions similar to this which are in the nature of equitable proceedings.

Id., 332 U.S. at 26.

The judgment that Wyoming seeks on its counterclaim at this stage of the case is necessarily a partial summary judgment. It is within the scope and purpose of FED. R. CIV. P. 56(d). In the words of the drafters of the Federal Rules of Civil Procedure:

> The partial summary judgment is merely a pre-trial adjudication that certain issues shall be deemed established for the trial of the case. This adjudication is more nearly akin to the preliminary order under Rule 16, and likewise serves the purpose of speeding up litigation by eliminating before trial matters wherein there is no genuine issue of fact.

Advisory Committee Notes Accompanying 1946 Amendment to FED. R. CIV. P. 56.

Nebraska originally contended in the earlier litigation in this case that the apportionment should extend all the way down the North Platte and Platte Rivers in Nebraska to Grand Island, Nebraska. Special Master's

Report at 92, *Nebraska v. Wyoming*, 325 U.S. 589 (1945). Nebraska presented extensive evidence of uses in the entire North Platte River basin. Special Master's Report at 254-67, *id.* At the close of the evidence, the Special Master concluded the following as to uses below Tri-State Dam:

> Nebraska now insists upon interstate priority administration extending only as far east as Bridgeport in that State. This removes the section east of Bridgeport from any further direct involvement in the case. As to the section west of Bridgeport to the Tri-State Dam, the conclusion has already been stated that its canals are so well supplied from return flows and other local sources that the section may be omitted from any consideration of interstate distribution.

Special Master's Report at 92, *id.*

Nebraska took exception to the Special Master's conclusion that no apportionment should be made for uses below Tri-State Dam. *Nebraska v. Wyoming*, 325 U.S. 589, 654-55 (1945). The Supreme Court expressly denied Nebraska's exception and adopted the Special Master's conclusion. The Court held:

> We think, as we will develop later, that the record sustains the conclusion that equitable apportionment does not permit Nebraska to demand direct flow water from above Whalen for use below Tri-State. . . . If, as the United States fears, the decree is administered so as to divert water from above Tri-State to the use of those diverting below Tri-State, application for appropriate relief may be made at the foot of the decree.

Id., 325 U.S. at 628-29.

The Decree specifies certain canals serving Nebraska lands that are entitled to priority over diversion and storage by the federal projects in Wyoming and that are entitled to delivery of water under Nebraska's 75% apportionment of the natural flow below Whalen. Decree, paras. IV-V. Finally, the very basis of the apportionment of 75% of the natural flow below Whalen to Nebraska was a determination by the Special Master of the reasonable requirements of the Nebraska lands irrigated by canals diverting at or above Tri-State Dam. *Nebraska v. Wyoming*, 325 U.S. 589, 646-51 (1945).

When read in their entirety, the Decree, the Court's opinion and the Special Master's Report make clear the Court's conclusion that an apportionment of water in the North Platte River in Wyoming was not necessary to protect Nebraska uses below Tri-State Dam. Again, it is noteworthy that the Special Master had serious questions whether *any* restriction on Wyoming was necessary to prevent unreasonable harm to Nebraska. Special Master's Report at 10-11, 119-22, *id.* That is why the relief he recommended was limited in scope.

It is very important to Wyoming that it have certainty in the apportionment of the North Platte. This Court has recognized the value and importance of certainty and finality in the allocation of water resources in the arid west. *Arizona v. California*, 460 U.S. 605 (1983); *Nevada v. United States*, 463 U.S. 110 (1983). The

limit of Nebraska's rights under the Decree to lands supplied by diversions at or above Tri-State Dam has been a key element in Wyoming's water supply planning. This issue must be laid to rest if Wyoming is to be able to reasonably plan future water development.

To the extent Nebraska seeks to enforce the Decree in order to provide water for Nebraska uses below Tri-State Dam, its petition should be denied as a matter of law. Moreover, for the purpose of simplifying and clarifying the issues remaining to be tried on Wyoming's counterclaim, the Court should confirm as a matter of law that Nebraska's rights under the Decree are limited to the supply of water for lands irrigated by canals diverting at or upstream of Tri-State Dam.

CONCLUSION

For the foregoing reasons, the Court should enter summary judgment for Wyoming and against Nebraska on all of the claims in Nebraska's petition and should declare as a matter of law that Nebraska's rights under the Decree are limited to the irrigation of lands served by the canals specified in the Decree diverting at or upstream of Tri-State Dam.

Respectfully submitted,

JOSEPH B. MEYER
Attorney General of Wyoming

DENNIS C. COOK
Senior Assistant Attorney General
Counsel of Record

JENNIFER HAGER
Assistant Attorney General

123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

RAPHAEL J. MOSES
CHARLES N. WOODRUFF
JAMES R. MONTGOMERY
Special Assistant Attorneys General

MOSES, WITTEMYER, HARRISON
AND WOODRUFF, P.C.
1002 Walnut Street, Suite 300
Boulder, Colorado 80302
(303) 443-8782

No. 108. Original

In The Supreme Court

Of The United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defandant.

APPENDIX
TO WYOMING BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

OVERSIZE FOLDOUT(S) FOUND HERE IN THE PRINTED EDITION OF THIS VOLUME ARE FOUND FOLLOWING THE LAST PAGE OF TEXT IN THIS MICROFICHE EDITION.

SEE FOLDOUT NO 1

NEBRASKA v. WYOMING
(325 U.S. 589)
Decree

DECREE.
(Entered October 8, 1945)

This cause having been heretofore submitted on the report of the Special Master and the exceptions of the parties thereto, and the Court being now fully advised in the premises:

It is ordered, adjudged and decreed that:

I. The State of Colorado, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

(a) From diverting or permitting the diversion of water from the North Platte River and its tributaries for the irrigation of more than a total of 135,000 acres of land in Jackson County, Colorado, during any one irrigation season;

(b) From storing or permitting the storage of more than a total amount of 17,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries in Jackson County, Colorado, between October 1 of any year and September 30 of the following year;

(c) From exporting out of the basin of the North Platte River and its tributaries in Jackson County, Colorado, to any other stream basin or basins more than 60,000 acre feet of water in any period of ten consecutive years reckoned in continuing progressive series beginning with October 1, 1945.

II. Exclusive of the Kendrick Project and Seminoe Reservoir the State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

(a) From diverting or permitting the diversion of water from the North Platte River above the Guernsey Reservoir and from the tributaries entering the North Platte River above the Pathfinder Dam for the irrigation of more than a total of 168,000 acres of land in Wyoming during any one irrigation season.

(b) From storing or permitting the storage of more than a total amount of 18,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries above the Pathfinder Reservoir between October 1 of any year and September 30 of the following year.

III. The State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe and Alcova Reservoirs otherwise than in accordance with the relative storage rights, as among themselves, of such reservoirs, which are hereby defined and fixed as follows:

First, Pathfinder Reservoir;
Second, Guernsey Reservoir;
Third, Seminoe Reservoir; and
Fourth, Alcova Reservoir;

Provided, however, that water may be impounded in or released from Seminoe Reservoir, contrary to the foregoing rule of priority operation for use in the generation of electric power when and only when such storage or release will not materially interfere with the administration of water for irrigation purposes according to the priority decreed for the French Canal and the State Line Canals.

IV. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe or Alcova Reservoirs, and from the diversion of natural flow water through the

Casper Canal for the Kendrick Project between and including May 1 and September 30 of each year otherwise than in accordance with the rule of priority in relation to the appropriations of the Nebraska lands supplied by the French Canal and by the State Line Canals, which said Nebraska appropriations are hereby adjudged to be senior to said four reservoirs and said Casper Canal, and which said Nebraska appropriations are hereby identified and defined, and their diversion limitations in second feet and seasonal limitations in acre feet fixed as follows:

Lands	*Canal*	*Limitation in Sec. Feet*	*Seasonal Limitation in Acre Ft.*
Tract of 1,025 acres	French	15	2,227
Mitchell Irrigation District	Mitchell	195	35,000
Gering Irrigation District	Gering	193	36,000
Farmers Irrigation District	Tri-State	748	183,050
Ramshorn Irrigation District	Ramshorn	14	3,000

V. The natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, including the contribution of Spring Creek, be and the same hereby is apportioned between Wyoming and Nebraska on the basis of twenty-five per cent to Wyoming and seventy-five per cent to Nebraska, with the right granted Nebraska to designate from time to time the portion of its share which shall be delivered into the Interstate, Fort Laramie, French and Mitchell Canals for use on the Nebraska lands served by these canals. The State of Nebraska, its officers, attorneys, agents and employees, and the State of Wyoming, its officers, attorneys, agents and employees, are hereby enjoined and restrained from diversion or use contrary to this apportionment, provided that in the apportionment of water in this section the flow for each day, until ascertainable, shall be assumed to be the same as that of the preceding day, as shown by the measurements and computations for that day, and provided further, that

unless and until Nebraska, Wyoming and the United States agree upon a modification thereof, or upon another formula, reservoir evaporation and transporation losses in the segregation of natural flow and storage shall be computed in accordance with the following formula taken from United States' Exhibit 204A:

Reservoir Evaporation Losses

Seminoe, Pathfinder and Alcova Reservoirs.

Evaporation will be computed daily based upon evaporation from Weather Bureau Standard 4 foot diameter Class "A" pan located at Pathfinder Reservoir. Daily evaporation will be multiplied by area of water surface of reservoir in acres and by co-efficient of 70% to reduce pan record to open water surface.

Guernsey Reservoir

Compute same as above except use pan evaporation at Whalen Dam.

River Carriage Losses.

River carriage losses will be computed upon basis of area of river water surface as determined by aerial surveys made in 1939 and previous years and upon average monthly evaporation at Pathfinder Reservoir for the period 1921 to 1939, inclusive, using a co-efficient of 70% to reduce pan records to open water surface.

Daily evaporation losses in second-feet for various sections of the river are shown in the following table:

TABLE

River Section	*Area Acres*	*Daily Loses-Second Feet May*	*June*	*July*	*Aug.*	*Sept.*
Alcova to Wendover	*8,360*	*53*	*76*	*87*	*76*	*56*
Guernsey Res. to Whalen	*560*	*4*	*5*	*6*	*5*	*4*
Whalen to State Line	*2,430*	*16*	*22*	*25*	*22*	*16*

Above table is based upon mean evaporation at Pathfinder as follows: May .561 ft.; June .767 ft.; July .910 ft.; Aug. .799 ft.; Sept. .568 ft. Co-efficient of

70% to reduce pan record to open water surface.

Above table does not contain computed loss for section of river from Pathfinder Dam to head of Alcova Reservoir (area 170 acres) because this area is less than submerged area of original river bed in Alcova Reservoir, and is, therefore, considered as off-set.

Likewise the area between Seminoe Dam and head of Pathfinder Reservoir is less than area of original river bed through Pathfinder Reservoir—considered as off-set. Evaporation losses will be divided between natural flow and storage water flowing in any section of river channel upon a proportional basis. This proportion will ordinarily be determined at the upper end of the section except under conditions of intervening accruals or diversions that materially change the ratio of storage to natural flow at the lower end of the section. In such event the average proportion for the section will be determined by using the mean ratio for the two ends of the section.

In the determination of transportation losses for the various sections of the stream, such time intervals for the passage of water from point to point shall be used as may be agreed upon by Nebraska, Wyoming and the United States, or in the absence of such agreement, as may be decided upon from day to day by the manager of the government reservoirs, with such adjustments to be made by said manager from time to time as may be necessary to make as accurate a segregation as is possible.

VI. This decree is intended to and does deal with and apportion only the natural flow of the North Platte River. Storage water shall not be affected by this decree and the owners of rights therein shall be permitted to distribute the same in accordance with any lawful contracts which they may have entered into or may in the future enter into, without interference because of this decree.

VII. Such additional gauging stations and measuring devices at or near the Wyoming-Nebraska state line, if any, as may be necessary for making any apportionment herein decreed, shall be constructed and maintained at the joint and equal expense of Wyoming and Nebraska to the extent that the costs thereof are not paid by others.

VIII. The State of Wyoming, it officers, attorneys, agents and employees be and they are hereby severally enjoined from diverting or permitting the diversion of water from the North Platte River or its tributaries at or above Alcova Reservoir in lieu of or in exchange for return flow water from the Kendrick Project reaching the North Platte River below Alcova Reservoir.

IX. The State of Wyoming and the State of Colorado be and they hereby are each required to prepare and maintain complete and accurate records of the total area of land irrigated and the storage and exportation of the water of the North Platte River and its tributaries within those portions of their respective jurisdictions covered by the provisions of paragraphs I and II hereof, and such records shall be available for inspection at all reasonable times; provided, however, that such records shall not be required in reference to the water uses permitted by paragraph X hereof.

X. This decree shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic, municipal and stock watering purposes and consumption.

XI. For the purposes of this decree:

(a) "Season" or "seasonal" refers to the irrigation season, May 1 to September 30, inclusive;

(b) The term "storage water" as applied to releases

from reservoirs owned and operated by the United States is defined as any water which is released from reservoirs for use on lands under canals having storage contracts in addition to the water which is discharged through those reservoirs to meet natural flow uses permitted by this decree;

(c) "Natural flow water" shall be taken as referring to all water in the stream except storage water;

(d) Return flows of Kendrick Project shall be deemed to be "natural flow water" when they have reached the North Platte River, and subject to the same diversion and use as any other natural flow in the stream.

XII. This decree shall not affect:

(a) The relative rights of water users within any one of the States who are parties to this suit except as may be otherwise specifically provided herein;

(b) Such claims as the United States has to storage water under Wyoming law; nor will the decree in any way interfere with the ownership and operation by the United States of the various federal storage and power plants, works and facilities.

(c) The use or disposition of any additional supply or supplies of water which in the future may be imported into the basin of the North Platte River from the water shed of an entirely separate stream, and which presently do not enter said basin, or the return flow from any such supply or supplies.

(d) The apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte River;

(e) The apportionment made by the compact between the States of Nebraska and Colorado, apportioning the water of the South Platte River.

XIII. Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court

retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to, the following:

(a) The question of the applicability and effect of the Act of August 9, 1937, 50 Stat. 564, 595-596, upon the rights of Colorado and its water users when and if water hereafter is available for storage and use in connection with the Kendrick Project in Wyoming.

(b) The question of the effect upon the rights of upstream areas of the construction or threatened construction in downstream areas of any projects not now existing or recognized in this decree;

(c) The question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir;

(d) The question of the right to divert at or above the headgate of the Casper Canal any water in lieu of, or in exchange for, any water developed by artificial drainage to the river of sump areas on the Kendrick Project;

(e) Any question relating to the joint operation of Pathfinder, Guernsey, Seminoe and Alcova Reservoirs whenever changed conditions make such joint operation possible;

(f) Any change in conditions making modification of the decree or the granting of further relief necessary or appropriate.

XIV. The costs in this cause shall be apportioned and paid as follows: the State of Colorado one-fifth; the State of Wyoming two-fifths; and the state of Nebraska two-fifths. Payment of the fees and expenses of the Special Master has been provided by a previous order of this Court.

XV. The clerk of this Court shall transmit to the chief

magistrates of the States of Colorado, Wyoming and Nebraska, copies of this decree duly authenticated under the seal of this Court.

NEBRASKA v. WYOMING
(345 U.S. 981)

Order Modifying and Supplementing Decree.
(Entered June 15, 1953)

No. 5, ORIGINAL. NEBRASKA v. WYOMING (COLORADO, IMPLEADED DEFENDANT, AND THE UNITED SSTATES, INTERVENOR.)

The joint motion for approval of a stipulation and to modify and supplement the decree is granted and the following order is entered in compliance with the stipulation:

The parties to this cause having filed a stipulation, dated January 14, 1953, and a joint motion for approval of the stipulation and to modify and supplement the decree entered on October 8, 1945 (325 U.S. 665) and the Court being fully advised:

The stipulation dated January 14, 1953, is approved; and

IT IS ORDERED that the decree of October 8, 1945, is hereby modified and supplemented as follows:

1. In paragraph I(a) of the decree the figure "145,000" is substituted for the figure "135,000."

2. Paragraph XIII is amended by striking the first sentence and substituting for it the following:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief, except that for a period of five years from and after June 15, 1953, the State of Colorado shall not institute any proceedings for the amendment of the decree or for further relief. In the event that within said period of five years any other party applies for an amendment

> of the decree or for further relief, then the State of Colorado may assert any and all rights, claims or defenses available to it under the decree as amended.

3. Two new paragraphs, as follows, are added to the decree:

> XVI. Whatever claims or defenses the parties or any of them may have in respect to the application, interpretation or construction of the Act of August 9, 1937 (50 Stat. 564-595) shall be determined without prejudice to any party arising because of any development of the Kendrick Project occurring subsequent to October 1, 1951.
>
> XVII. When Glendo Dam and Reservoir are constructed, the following provisions shall be effective:
>
> (a) The construction and operation of the Glendo Project shall not impose any demand on areas at or above Seminoe Reservoir which will prejudice any rights that the States of Colorado and Wyoming might have to secure a modification of the decree permitting an expansion of water uses in the natural basin of the North Platte River in Colorado or above Seminoe Reservoir in Wyoming.
>
> (b) The construction and operation of Glendo Reservoir shall not affect the regimen of the natural flow of the North Platte River above Pathfinder Dam. The regimen of the natural flow of the North Platte River below Pathfinder Dam shall not be changed, except that not more than 40,000 acre feet of the natural flow of the North Platte River and its tributaries which cannot be stored in upstream reservoirs under the provisions of this decree may be stored in the Glendo Reservoir during any water year, in addition to evaporation losses on such storage, and, further, the amount of such storage water that may be held in storage at any one time, including carryover storage, shall never

exceed 100,000 acre feet. Such storage water shall be disposed of in accordance with contracts to be hereafter executed, and it may be used for the irrigation of lands in the basin of the North Platte River in western Nebraska to the extent of 25,000 acre feet annually, and for the irrigation of lands in the basin of the North Platte River in southeastern Wyoming below Guernsey Reservoir to the extent of 15,000 acre feet annually, provided that it shall not be used as a substitute for storage water contracted for under any existing permanent arrangements. The above limitation on storage of natural flow does not apply to flood water which may be temporarily stored in any capacity allocated for flood control in the Glendo Reservoir, nor to water originally stored in Pathfinder Reservoir which may be temporarily re-stored in Glendo Reservoir after its release from Pathfinder and before its delivery pursuant to contract; nor to water which may be impounded behind Glendo Dam, as provided in the Bureau of Reclamation Definite Plan Report for the Glendo Unit dated December 1952, for the purpose of creating a head for the development of water power.

(c) Paragraph III of the decree is amended to read as follows:

III. The State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe, Alcova and Glendo Reservoirs otherwise than in accordance with the relative storage rights, as among themselves, of such reservoirs, which are hereby defined and fixed as follows:

First, Pathfinder Reservoir;
Second, Guernsey Reservoir;
Third, Seminoe Reservoir;
Fourth, Alcova Reservoir; and
Fifth, Gle ıdo Reservoir;

Provided, however that water may be impounded in or released from Seminoe Reservoir, contrary to the foregoing rule of priority operation for use in the generation of electric power when and only when such storage or release will not materially interfere with the administration of water for irrigation purposes according to the priority decreed for the French Canal and the State Line Canals.

Storage rights of Glendo Reservoir shall be subject to the provisions of this paragraph III.

(d) Paragraph IV of the decree is amended to read as follows:

IV. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe, Alcova and Glendo Reservoirs, and from the diversion of natural flow water through the Casper Canal for the Kendrick Project between and including May 1 and September 30 of each year otherwise than in accordance with the rule of priority in relation to the appropriations of the Nebraska lands supplied by the French Canal and by the State Line Canals, which said Nebraska appropriations are hereby adjudged to be senior to said five reservoirs and said Casper Canal, and which said Nebraska appropriations are hereby identified and defined, and their diversion limitations in second feet and seasonal limitations in acre feet fixed as follows:

Lands	*Canal*	*Limitation in Sec. Feet*	*Seasonal Limitation in Acre Ft.*
Tract of 1025 acres	French	15	2,227
Mitchell Irrigation District	Mitchell	195	35,000
Gering Irrigation District	Gering	193	36,000
Farmers Irrigation District	Tri-State	748	183,050
Ramshorn Irrigation District	Ramshorn	14	3,000

(e) Paragraph V of the decree is amended to read as follows:

V. The natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, including the contribution of Spring Creek, be and the same hereby is apportioned between Wyoming and Nebraska on the basis of twenty-five per cent to Wyoming and seventy-five per cent to Nebraska, with the right granted Nebraska to designate from time to time the portion of its share which shall be delivered into the Interstate, Fort Laramie, French and Mitchell Canals for use on the Nebraska lands served by these canals. The State of Nebraska, its officers, attorneys, agents and employees, and the State of Wyoming, its officers, attorneys, agents and employees, are hereby enjoined and restrained from diversion or use contrary to this apportionment, provided that in the apportionment of water in this section the flow for each day, until ascertainable, shall be assumed to be the same as that of the preceding day, as shown by the measurements and computations for that day, and provided further, that unless and until Nebraska, Wyoming and the United States agree upon a modification thereof, or upon another formula, reservoir evaporation and transportation losses in the segregation of natural flow and storage shall be computed in accordance with the following formula taken from United States' Exhibit 204A and the stipulation of the parties dated January 14, 1953, and filed on January 30, 1953:

Reservoir Evaporation Losses.

Seminoe, Pathfinder and Alcova Reservoirs.

Evaporation will be computed daily based upon evaporation from Weather Bureau Standard 4 foot diameter Class "A" pan located at Pathfinder Reservoir. Daily evaporation will be multiplied by area of water surface of reservoir in acres and by co-efficient of

70% to reduce pan record to open water surface.

Glendo and Guernsey Reservoirs.

Compute same as above except use pan evaporation at Whalen Dam.

River Carriage Losses.

River carriage losses will be computed upon basis of area of river water surface as determined by aerial surveys made in 1939 and previous years and upon average monthly evaporation at Pathfinder reservoir for the period 1921 to 1939, inclusive, using a co-efficient of 70% to reduce pan records to open water surface.

Daily evaporation losses in second-feet for various sections of the river are shown in the following table:

TABLE

River Section	*Area Acres*	*Daily Loss-Second Feet May*	*June*	*July*	*Aug.*	*Sept.*
Alcova to Glendo Reservoir	6,740	43	61	70	61	45
Guernsey Reservoir to Whalen	560	4	5	6	5	4
Whalen to State Line	2,430	16	22	25	22	16

Above table is based upon mean evaporation at Pathfinder as follows: May .561 ft.; June .767 ft.; July .910 ft.; Aug. .799 ft.; Sept. .568 ft. Co-efficient of 70% to reduce pan record to open water surface.

Above table does not contain computed loss for section of river from Glendo Dam to head of Guernsey Reservoir (area 680 acres) because this area is less than submerged area of original river bed (940 acres) in Glendo Reservoir and is, therefore, considered as off-set.

Above table does not contain computed loss for section of river from Pathfinder Dam to head of Alcova Reservoir (area 170 acres) because this area is less than

submerged area of original river bed in Alcova Reservoir and is, therefore, considered as off-set.

Likewise the area between Seminoe Dam and head of Pathfinder Reservoir is less than area of original river bed through Pathfinder Reservoir—considered as off-set. Evaporation losses will be divided between natural flow and storage water flowing in any section of river channel upon a proportional basis. This proportion will ordinarily be determined at the upper end of the section except under conditions of intervening accruals or diversions that materially change the ratio of storage to natural flow at the lower end of the section. In such event the average proportion for the section will be determined by using the mean ratio for the two ends of the section.

In the determination of transportation losses for the various sections of the stream, such time intervals for the passage of water from point to point shall be used as may be agreed upon by Nebraska, Wyoming and the United States, or in the absence of such agreement, as may be decided upon from day to day by the manager of the government reservoirs, with such adjustments to be made by said manager from time to time as may be necessary to make as accurate a segregation as is possible.

Clarence S. Beck, Attorney General, and *Bert L. Overcash*, Assistant Attorney General, for the State of Nebraska, *Howard B. Black*, Attorney General, for the State of Wyoming, *Duke W. Dunbar*, Attorney General, *H. Lawrence Hinkley*, Deputy Attorney General, and *Jean S. Breitenstein* for the State of Colorado, and *Acting Solicitor General Stern* for the United States.

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATE OF NEBRASKA, et al., Appellees, v. BASIN ELECTRIC POWER COOPERATIVE, et al., Appellants.	)	No. 78-1775
STATE OF NEBRASKA, et al., Appellees, v. RURAL ELECTRIFICATION ADMINISTRATION, et al., Appellants.	)	No. 78-1778

STIPULATION

It is hereby stipulated and agreed by and between the undersigned attorneys for the respective parties hereto that:

1. The Agreement of Settlement and Compromise ("Agreement") which was fully and finally executed on December 4, 1978, and which is attached to the Memorandum of Law being filed herewith as Appendix A and which is incorporated herein by reference, constitutes a full and final resolution of the disputes which gave rise to the above-captioned consolidated appeals.

2. Paragraph 14 of the Agreement provides that the Agreement shall be null and void unless each of the following occurs:

(a) the Secretary of the Interior gives his concurrence to section 12 of this Agreement;

(b) the Grayrocks Dam and Reservoir receives an exemption as provided in section 5 of the Endangered Species Act Amendments of 1978 or the Committee referred to therein determines that by virtue of this Agreement no exemption is required for the Project to proceed as in this Agreement provided; and

(c) the district court's judgment is vacated and the pending litigation is dismissed with prejudice.

3. The conditions subsequent contained in Paragraphs 14(a) and (b) of the Agreement have been satisfied. Attached as Exhibit B to the Memorandum of Law being filed herewith, is a letter of the Secretary of the Interior to Edward Weinberg dated January 5, 1979[1] which reflects the Secretary's concurrence to Section 12 of the Agreement. Attached as Exhibit C to the Memorandum of Law being filed herewith is a copy of the official transcript of the Endangered Species Committee. As pages 12-14 of that transcript reflect, the Endangered Species Committee voted unanimously in favor of the proposition which:

> "...[G]rants an exemption for Grayrocks project with the explicit condition of those mitigation and enhancement provisions set forth in the agreement of settlement and compromise dated December 4, 1978, by and among the litigants in the case of Nebraska et al. versus REA, et al."
>
> (Tr. at 12).

4. To satisfy the condition subsequent of Paragraph 14(c) of the Agreement, this Court is requested to enter an order which:

(1) provides that the amended judgment of the District Court below which was entered on October 23, 1978 and docketed on October 24, 1978 is vacated;

[1] The letter bears an erroneous date of January 5, 1978. The letter was actually issued on January 5, 1979.

(2) provides that these consolidated appeals are dismissed;

(3) remands the cases to the District Court with instructions to dismiss the cases with prejudice, provided that any party to the limitation may petition the District Court for the interpretation and enforcement of any of the terms of the Agreement of Settlement and Compromise dated December 4, 1978 which is attached as Exhibit A to the parties' Joint Memorandum of Law and which is incorporated herein by reference; and

(4) provides that, except as specifically provided in the Agreement, each party is to bear its own costs incurred in this litigation.

A proposed order which all parties agree will carry the Agreement into effect is being filed herewith.

5. The Rural Electrification Administration of the Department of Agriculture is currently preparing a supplemental environmental impact statement on the Missouri Basin Power Project, as required by Paragraph 13 of the Agreement.

6. All plaintiffs and intervening plaintiffs below agree, with respect to the Project which is the subject to the litigation herein, that they will neither bring nor support any new litigation by whomever brought asserting that any new environmental impact statements under the National Environmental Policy Act or actions under the Endangered Species Act of 1973, as amended by the Endangered Species Act Amendments of 1978, or under the Federal Water Pollution Control Act, as amended by the Clean Water Act of 1977, or under the Fish and Wildlife Coordination Act, are required in connection with the carrying out by the Missouri Basin Power Project of its obligations under the Agreement.

Dated: February 20, 1979.

(Signed)
Attorney for Defendant Basin
Electric Power Cooperative and
all Intervening Defendants

(Signed)
Attorney for Federal Defendants

(Signed)
Attorney for National Wildlife Federation,
Nebraska Wildlife Federation, and
National Audubon Society

(Signed)
Attorney for State of Nebraska

(Signed)
Attorney for Powder River Basin
Resource Council and Laramie River
Conservation Council

AGREEMENT OF SETTLEMENT AND COMPROMISE

THIS AGREEMENT OF SETTLEMENT AND COMPROMISE ("Agreement"), made and entered into this 4th day of December, 1978, by and among Basin Electric Power Cooperative ("Basin"), on its own behalf and as project manager and operating agent for the Missouri Basin Power Project ("Project"); Tri-State Generation and Transmission Association, Inc. ("Tri-State"), on its behalf and as agent for Chimney Rock Public Power District, the Midwest Electric Membership Corporation, Panhandle Rural Electric Membership Association, Northwest Rural Public Power District and Wheat Belt Power District; City of Lincoln, Nebraska; Wyoming Municipal Power Agency ("WMPA"); the State of Nebraska; the National Wildlife Federation, Inc.; Nebraska Wildlife Federation; National Audubon Society; Powder River Basin Resource Council; Laramie River Conservation Council; Anthony C. Liotta, in his official capacity as Deputy Assistant Attorney General, Land and Natural Resources Division, United States Department of Justice; Robert W. Feragen, in his official capacity as Administrator of the Rural Electrification Administration, United States; and James W. Ray, in his official capacity as District Engineer, Omaha District, United States Army Corps of Engineers.

WHEREAS, the parties desire to settle and compromise the dispute that has arisen among them concerning whether the REA Administrator, in issuing loan guarantees for the Project, and the District Engineer, Omaha District, U.S. Army Corps of Engineers, in issuing a dredge and fill permit for the Grayrocks Dam and Reservoir, a feature of the Project, under Section 404 of the Federal Water Pollution Control Act, as amended, acted in compliance with applicable laws and regulations;

NOW THEREFORE, in consideration of the promises

and convenants herein contained, the parties hereto agree as follows:

1. The maximum annual consumptive water use by the power plant at the Laramie River Station will be limited to 23,250 acre-feet per year.

2. To satisfy the requirements cited in Section 1 above, the Project will first utilize the quantity of water which is available to the Project as a result of the Boughton Ditch acquisition. The Project will, secondly, utilize the quantity of water which is available to the Project from the inundated water rights at the reservoir site. The Project will, thirdly, utilize the quantity of water which has been made available to the Project from the Johnson well fields in accordance with the Order of the Wyoming State Engineer dated November 1, 1978 (The Project shall withdraw the "enlargement application" set forth in Paragraph 4 of that Order at page 12). The Project will, fourthly, utilize the water which is stored in the Grayrocks Reservoir. The water rights representing the foregoing are enumerated in Exhibit A appended hereto and incorporated herein by reference. The Project shall not obtain any water or water rights within the Laramie River drainage other than those set out above and enumerated in Exhibit A, or store any water in the Grayrocks Reservoir except pursuant to water rights set out above and enumerated in Exhibit A, or cause the other obligations of this Agreement to be satisfied by water or water rights from within the Laramie River drainage other than by those set out above and enumerated in Exhibit A, except that:

(a) The project may for purposes of start up, initial plant operation and for subsequent intermittent periods of plant operation, utilize groundwater from irrigation wells existing as of the date of this Agreement, or from new wells used in lieu of existing irrigation wells, but only so that such

groundwater use by the Project shall not exceed on an annual basis the amount of water historically consumed by the irrigation appropriation and use from the above mentioned existing wells as determined by the appropriate Wyoming state agency. (This groundwater use shall not increase the limit stated in Section 1); and

(b) This provision shall not preclude acquisition of water or water rights of Corn Creek Irrigation District by the Project to satisfy the other provisions of this Agreement out of water rights or applications for water rights of Corn Creek Irrigation District existing as of the date of this Agreement.

3. All water intake structures will be designed and implemented for the sole purpose of supplying water to the Project for Project purposes. No other intake structures will be allowed and the Project will not authorize other entities to construct intake structures at the reservoir site. All intake structures will be metered. A stream-gauging station will be provided above the reservoir and at a distance sufficiently remote from the reservoir so that reservoir storage will not affect the accuracy of the stream-guaging [sic] apparatus. There will be stream-gauging station located below the dam and reservoir site but above any additional drainage or draw from the river and another stream-guaging [sic] station at the mouth of the Laramie River. There will be metering apparatus in each pumping structure supplying water to the Project, including all underground water wells.

4. (a) The Project agrees to release adequate flows from Grayrocks Reservoir to insure that flows at a minimum, as measured at the first gauging station below the dam, are 40 cfs during April, and 40 cfs or 75% of the natural flow at the same gauging station during the remaining five months of the year (May through September, inclusive).

whichever is greater. The Project agrees to operate the Grayrocks Reservoir so as to provide for the delivery of 40 cfs at the mouth of the Laramie River during six months of the year (October through March, inclusive), 50 cfs during April, and 40 cfs or 75% of the natural flow of the Laramie River at its mouth during the remaining five months of the year (May thorugh [sic] September, inclusive), whichever is greater: provided, that the Project will not be required to release more than 200 cfs at any one time nor more than 12,000 acre-feet during any month.

(b) During the initial reservoir filling period, flows will be maintained at the mouth of the Laramie River of at least 20 cfs from October through March, and at 40 cfs during the six months until 70,000 acre-feet have been placed in storage.

(c) Whenever total reservoir storage drops below 50,000 acre-feet, the flow levels to be maintained by the Project shall be 20 cfs from October through March, and 40 cfs from April through September, as measured at the mouth of the Laramie River.

5. When and if the Corn Creek Irrigation District constructs its diversion and delivery system and the District begins using water from the Laramie River Basin, the Project will deliver into the mouth of the Laramie River on an annual basis an amount of water equal to the minimum flows specified in Section 4 minus 22,500 acre-feet and, in addition, will deliver into the North Platte River on an annual basis 11,250 acre-feet, subject to adjustment as provided below. The Project may meet this obligation (subject to the limitations in Section 2) with any flows from the Laramie River which exceed the number of acre-feet derived by subtracting 22,500 from the minimum flow figures in Section 4. Alternatively, at its option, the Project may acquire a portion of this amount or an equivalent

amount of water from sources in Wyoming and/or the North Platte Basin in Nebraska and deliver it to the North Platte. This obligation shall continue for as long as the Laramie River Station remains in commercial operation.

6. If the water delivered to the North Platte River by the Project is obtained from any source below the confluence of the Laramie River and the North Platte River, the Project shall be credited with the amount deemed to be conveyance loss. Conveyance loss shall be determined by the North Platte Natural Flow Committee referred to in Section 8.

7. The Project will deliver water annually as provided in sections 5 and 6 above, in the same irrigation season that it is withdrawn by the Corn Creek Irrigation District. For purposes of this Agreement, the irrigation season shall be April through September, inclusive. As used in sections 5 and 6, "deliver" includes, without limitation, abandonment to the North Platte, or failure to use, either temporarily or permanently, Laramie River or North Platte River water or water rights, the right to the use of which has been acquired by the Project, either by purchase, contract or otherwise, so that either the flow of the North Platte is augmented or an existing depletion is avoided as the result of such abandonment or failure to use.

8. The Project will annually submit to the Governor of the State of Nebraska, the Attorney General of the State of Nebraska, and the Director of the Department of Water Resources of the State of Nebraska (with copies to the Laramie River Conservation Council, the Powder River Basin Resource Council, and the National Wildlife Federation) a written report containing all the data and information necessary to show that all conditions agreed to in this Agreement have been fully complied with. The annual report will also incude all pertinent data and information

gathered from the metering and gauging apparatus required in section 3 above. The Project will submit this written report, as well as an oral report, if asked to do so, to the North Platte Natural Flow Committee meeting of officials of the State of Nebraska and the State of Wyoming each year. For the purpose of assuring interested parties that the gauging apparatus is accurately recording data and in proper working condition, officials of the Nebraska Department of Water Resources will be allowed to verify the information supplied from the gauging apparatus and to conduct appropriate tests, subject to prior agreement by the project Operating Agent, upon such apparatus to determine that they are in proper working condition. The Project will allow officials of the State of Nebraska to have access to all records kept and the right to request and receive reasonable supplemental data regarding compliance by the Project with the water release and delivery requirements of this Agreement.

9. Each October, Basin will request a meeting with a representative to be designated by the State of Nebraska, at which Basin will review its proposed operating plan for Grayrocks Reservoir for the next calendar year. Basin will give serious consideration to comments and recommendations by the Nebraska representative and modify its operating plan to the extent compatible in its judgment with full and efficient operation of Laramie River Station, its commitments to other parties in respect to reservoir management, and with any recommendations by other interested parties such as the U.S. Fish and Wildlife Service and the State of Wyoming. Similar information and consultation will be provided during the year if, in the judgment of the Operating Agent, significant changes in the operating plans are required.

10. Upon the occurrence of all of the events specified in Section 14, the Project, through Basin, shall establish the

Platte River Whooping Crane Habitat Maintenance Trust by executing a trust declaration in the form appended hereto as Exhibit B, which is incorporated herein by reference.

11. (a) Basin, Tri-State and WMPA agree that the proposed amendment to Wyoming Statute §41-3-104, attached hereto as Exhibit C is consistent with the policies of their respective organizations and for a period of ten (10) years hereafter agree to actively support the proposed amendment before the Wyoming Legislature. They further agree to actively support the specific concept of this proposed amendment if it is contained in or included with other proposed amendments to Wyoming Statute §41-3-104, which they otherwise may not choose to support.

(b) Basin (except as otherwise set forth in this Agreement as to the Project), Tri-State, and WMPA agree that they shall not, without prior written consent of the Laramie River Conservation Council and the Powder River Basin Resource Council, transfer, nor seek to transfer from irrigation use or appropriation to industrial use or appropriation, water or water rights within the Laramie River drainage before the 1st day of December, 1988.

12. The parties agree that compliance by the Project with this Agreement satisfies the requirements of the Endangered Species Act of 1973 as amended by the Endangered Species Act Amendments of 1978.

13. All objections to the adequacy of the existing EIS and to the 404 Permit as amended and to the REA loan guarantees are withdrawn. A supplemental EIS is under preparation. The non-Federal parties agree not to challenge its adequacy.

14. This Agreement shall be null and void unless each

of the following occurs:

(a) the Secretary of the Interior gives his concurrence to section 12 of this Agreement;

(b) the Grayrocks Dam and Reservoir receives an exemption as provided in section 5 of the Endangered Species Act Amendments of 1978 or the Committee referred to therein determines that by virtue of this Agreement no exemption is required for the Project to proceed as in this Agreement provided; and

(c) the district court's judgment is vacated and the pending litigation is dismissed with prejudice.

15. Upon execution of this Agreement, the parties, through their respective counsel, will promptly file in the Eighth Circuit Court of Appeals a stipulation incorporating this Agreement and requesting that the Eighth Circuit Court of Appeals take appropriate action to vacate the judgment of the District Court and to dismiss the pending litigation with prejudice. The stipulation shall also incorporate the agreement of plaintiffs that they will neither bring nor support any new litigation by whomever brought asserting any further environmental impact statements or actions under the Endangered Species Act of 1973 as amended by the Endangered Species Act Amendments of 1978 are required in connection with carrying out by the Project of its obligations under this Agreement.

16. Upon the occurrence of all of the events specified in Section 14, the Project shall pay attorneys' fees and costs as follows:

State of Nebraska	$60,000
Powder River Basin Resource Council and Laramie River Conservation Council	25,000

National Wildlife Federation, Nebraska Wildlife Federation, and National Audubon Society	50,000

17. This Agreement shall be executed in fourteen counterparts, numbered consecutively 1 through 14, each of which shall be deemed to be an original.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

(Signed)

Basin Electric Power Cooperative
Tri-State Generation and Transmission Association, Inc.
City of Lincoln
Wyoming Municipal Power Agency
The State of Nebraska (Governor and Attorney General)
The National Wildlife Federation, Inc.
The Nebraska Wildlife Federation
National Audubon Society, Inc.
Powder River Basin Resource Council
Laramie River Conservation Council
Deputy Assistant Attorney General*
Land and Natural Resources Division
Department of Justice
Administrator, Rural Electrification Administration*
District Engineer, Omaha District*
U.S. Army Corps of Engineers

*The Justice Department, the Rural Electrification Administration and the Corps of Engineers have no involvement in Sections 11 and 16 of this Agreement.

[EXHIBITS OMITTED]

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 78-1775

State of Nebraska, et al.,	)	
Appellees,	)	
v.	)	
Basin Electric Power	)	
Cooperative, Inc., et al.,	)	Appeals from the
Appellants.	)	United States District
		Court for the District
No. 78-1778		of Nebraska
State of Nebraska, et al.,	)	
Appellees,	)	
v.	)	
Rural Electrification	)	
Administration et al.,	)	
Appellants.	)	

Filed: February 27, 1979

Before GIBSON, Chief Judge, HEANEY and STEPHENSON, Circuit Judges.

ORDER

This cause having come before the court on a "Joint Motion Filed on Behalf of All Parties for an Order Dismissing Appeals, Vacating the Judgment Below, and Remanding the Cases to the District Court with Instructions to Dismiss With Prejudice," and the court having fully considered that motion, the accompanying Stipulation and Joint Memorandum of Law, and the entire record herein, it is

ORDERED that the amended judgment of the district

court below which was entered on October 23, 1978, and docketed on October 24, 1978, is hereby vacated;

FURTHER ORDERED that these consolidated appeals are hereby dismissed;

FURTHER ORDERED that these cases are hereby remanded to the district court with instruction to dismiss the cases with prejudice, provided that any party to the litigation may petition the district court for the interpretation and enforcement of any of the terms of the Agreement of Settlement and Compromise dated December 4, 1978, which is attached as Exhibit A to the parties' Joint Memorandum of Law and which is incorporated herein by reference; and

FURTHER ORDERED that, except as specifically provided in the Agreement of Settlement and Compromise, each party is to bear its own costs incurred in this litigation. Mandate will issue forthwith.

A true copy.

Attest: (Signed)
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

STATE OF NEBRASKA, et al.	)	
Plaintiffs.	)	
vs.	)	ORDER OF
RURAL ELECTRIFICATION	)	DISMISSAL
ADMINISTRATION, et al.	)	
Defendants.	)	CV76-L-242

Pursuant to the mandate from the United States Court of Appeals for the Eighth Circuit,

IT IS ORDERED that this case is dismissed with prejudice, provided that any party to the litigation may petition the district court for the interpretation and enforcement of any of the terms of the Agreement of Settlement and Compromise dated December 4, 1978.

Dated March 23, 1979.

BY THE COURT
(Signed)
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

STATE OF NEBRASKA, et al,	)	
Plaintiffs,	)	ORDER OF
vs.	)	DISMISSAL
JAMES W. RAY, et al,	)	CV78-L-90
Defendants.	)	

Pursuant to the mandate from the United States Court of Appeals for the Eighth Circuit,

IT IS ORDERED that this case is dismissed with prejudice, provided that any party to the litigation may petition the district court for the interpretation and enforcement of any of the terms of the Agreement of Settlement and Compromise dated December 4, 1978.

Dated March 23, 1979.

BY THE COURT
(Signed)
Chief Judge

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT IN AND FOR GOSHEN COUNTY, WYOMING

STATE OF WYOMING, ex rel., GEORGE L. CHRISTOPULOS, WYOMING STATE ENGINEER, Plaintiff, vs. UNITED STATES OF AMERICA; U.S. DEPARTMENT OF INTERIOR; U.S. BUREAU OF RECLAMATION, and DONALD PAUL HODEL, SECRETARY OF THE INTERIOR; C. DALE DUVALL, COMMISSIONER OF RECLAMATION; BILL E. MARTIN, REGIONAL DIRECTOR, MISSOURI BASIN REGION, U.S. BUREAU OF RECLAMATION; DAVID G. WILDE, PROJECT MANAGER, NORTH PLATTE RIVER PROJECTS OFFICE, U.S. BUREAU OF RECLAMATION; KENNETH C. RANDOLPH, CHIEF, LAND AND WATER OPERATIONS BRANCH, NORTH PLATTE RIVER PROJECTS OFFICE, U.S. BUREAU OF RECLAMATION; WILLIAM McCRACKEN, HYDROLOGIC TECHNICIAN, LAND AND WATER OPERATIONS BRANCH, NORTH PLATTE RIVER PROJECTS OFFICE, U.S. BUREAU OF RECLAMATION, in their official capacities, Defendants.	)	Docket No. 23-13 Filed October 3, 1986 (Signed) Clerk of District Court, Goshen Co.

COMPLAINT

COMES NOW the State of Wyoming by and through its attorney, A.G. McClintock, Attorney General, and in support of this complaint against Defendants alleges:

1. This action is brought pursuant to W.S. 41-2-111 upon request of the State Engineer to bring a suit to enjoin the unlawful diversion, storage and use of the waters of the State.

2. This court has jurisdiction over this matter pursuant to W.S. 41-2-111, Article 5, Section 10 of the Wyoming Constitution and W.S. 1-37-101 et seq. (1977). In particular, W.S. 41-2-111 empowers the district court to enjoin the unlawful appropriation, diversion or use of waters of the State. A showing of injury in a suit brought pursuant to W.S. 41-2-111 is not required as a condition to the issuance of any temporary restraining order, preliminary or permanent injunction.

3. This District Court has jurisdiction over the Defendants pursuant to the McCarren Amendment, 43 U.S.C. § 666. That Act provides in part:

> Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by

> reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided That no judgment for costs shall be entered against the United States in any such suit.

4. Venue in the District Court of Goshen County, Wyoming is proper since the illegal diversion complained of herein occurs at Whalen Diversion Dam, on the North Platte River in Goshen County, Wyoming.

5. Defendant Donald Paul Hodel is Secretary of the Interior and, pursuant to 43 U.S.C. § 373, is charged by Congress with the duty of carrying out the provisions of the Reclamation Act of 1902, as amended. 43 U.S.C. § 371 et seq.

6. Defendant C. Dale Duvall is Commissioner of Reclamation and, pursuant to 43 U.S.C. § 373a, is charged by Congress with administration of the Reclamation Act of 1902, as amended. 43 U.S.C. §§ 371 et seq.

7. Defendant Bill E. Martin is the Regional Director for the Missouri Basin Region, U.S. Bureau of Reclamation (Bureau) which region includes the part of the North Platte River drainage that is relevant to this suit.

8. Defendants David G. Wilde, Project Manager, Kenneth C. Randolph, Chief of Land and Water Operations, and William McCracken, Hydrologic Technician, are employees of the U.S. Bureau of Reclamation in the North Platte River Projects Office in Mills, Wyoming and are responsible for the Bureau operations and facilities relevant to this action.

9. The Defendant United States owns and, through the

remaining Defendants, controls the diversion structures, conveyance systems and storage facilities in the "North Platte Project" along with the other storage facilities on the North Platte River in Wyoming where the unlawful acts occur and are therefore necessary parties to this suit.

10. The "North Platte Project" consists of reservoirs, structures and a system of canals and ditches that convey and distribute waters of the North Platte River to lands in Wyoming and Nebraska as part of a federal reclamation project. Defendants' Pathfinder Reservoir, Guernsey Reservoir, Whalen Diversion Dam, the Interstate Canal and four off-channel reservoirs (hereinafter referred to as the Inland Lakes) located in Nebraska and supplied by the Interstate Canal are the relevant component parts of the "North Platte Project."

11. The "North Platte Project" was planned, constructed and is to be operated in accordance with the provisions of an Act of Congress known as the Reclamation Act of 1902 as amended. 32 Stat. 388. Section 8 of that Act provides:

> That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream of waters thereof; *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and

beneficial use shall be the basis, the measure, and the limit of the right.

Id. at 390 (See 43 U.S.C. §§372, 383).

12. The North Platte River in Wyoming from which the unlawful diversions complained of herein are made is subject to administration according to Wyoming law and the terms and conditions of the Supreme Court's Order and Decree entered in *Nebraska v. Wyoming*, 325 U.S. 665, 66 S.Ct. 1, 89 L.Ed.2d 1857 (1945). Neither the Supreme Court's decree or its opinion in *Nebraska v. Wyoming*, 325 U.S. 589, 65 S.Ct. 1332, 89 L.Ed. 1815, (1945) relieved the Defendants from the duty of complying with the provisions of Wyoming law in order to appropriate, divert or use the waters of the North Platte River in Wyoming.

13. Article 8 Section 1 of the Wyoming Constitution provides that the water of all natural streams, springs, lakes or other collections of still water within the boundaries of the State are property of the Plaintiff, State of Wyoming.

14. Article 8 Section 3 of the Wyoming Constitution provides that priority of appropriation for beneficial uses shall give the better right.

15. Article 8 Section 5 of the Wyoming Constitution empowers the State Engineer to supervise the distribution of the waters of the State.

16. Pursuant to W.S. 41-4-501, any person, association or corporation intending to beneficially use the public water of the State must apply for and obtain a permit before doing so.

17. Pursuant to W.S. 41-3-301 et seq. (1977), any person, corporation, association or organization, of any nature

whatsoever, intending to divert water for beneficial use through storage must first apply for and obtain a permit before doing so.

18. Any person, association or corporation intending to store water in an off-stream reservoir is required to apply for and obtain a permit for the diversion of water through the reservoir supply canals to the reservoir and for the reservoir itself. W.S. 41-3-301 et seq. and W.S. 41-4-501 et seq. (1977).

19. Defendants are "persons" as defined by W.S. 8-1-102(a)(vi) and used in W.S. 41-4-301 et seq. and 41-3-501 et seq. and are subject to the provisions of Wyoming law.

20. Before Wyoming's waters can be appropriated, stored or diverted within this State for use outside of the State, compliance with the provisions of W.S. 41-3-115 (1977) is required.

21. Pursuant to Wyoming law, Defendants have secured adjudicated water rights for the "North Platte Project" for storage of water in Pathfinder Reservoir and Guernsey Reservoir. This water is allocated for irrigation of lands in Wyoming and Nebraska served through the Interstate Canal.

22. Defendants have not applied for or secured a permit to divert the natural flow of the North Platte River at Whalen Diversion Dam for conveyance through the Interstate Canal for storage in the Inland Lakes pursuant to Wyoming law. There is no other means of acquiring the right to divert Wyoming water for that purpose than through those provisions of Wyoming law set forth above. *Lewis v. Board of Control*, 699 P.2d 822 (Wyo. 1986).

23. Defendants have been diverting, are now diverting, and intend to continue diverting the natural flow of the

North Platte River at Whalen Diversion Dam, Goshen County, Wyoming through the Interstate Canal for storage in the Inland Lakes.

24. Defendant's diversion of the natural flow of the North Platte River at Whalen Diversion Dam for conveyance through the Interstate Canal for storage in the Inland Lakes is unlawful and therefore must cease.

25. Additionally, Defendants have in the past, are now and intend to continue diverting, accumulating and storing the natural flow of the North Platte River in their reservoirs in Wyoming for the benefit of the Inland Lakes out of priority, ahead of and separate and apart from the adjudicated storage rights in those reservoirs contrary to Wyoming law.

26. Defendants have neither applied for nor secured the necessary permits pursuant to Wyoming law to divert, accumulate and store water for the benefit of Inland Lakes in the manner described above in allegation 25. W.S. 41-3-301 et seq. and 41-4-501 et seq.

27. Defendants' accumulation and storage of natural flow waters in their Wyoming reservoirs, in the manner described above in allegation 25 for the benefit of Inland Lakes is unlawful and therefore must cease.

WHEREFORE, Plaintiff prays:

1. That this Court declare that Defendants have no rights to divert the natural flows of the North Platte River in Wyoming in any manner for storage in the Inland Lakes until they acquire such a right in the manner prescribed by Wyoming law.

2. That this Court permanently enjoin Defendants,

their agents, employees, and representatives from diverting natural flows of the North Platte River in Wyoming through the Interstate Canal for storage in the Inland Lakes or in any manner diverting, accumulating and storing water within their Wyoming reservoirs on the North Platte River for the benefit of storage in the Inland Lakes out of priority, ahead of and separate and apart from the adjudicated storage rights in those reservoirs until the Defendants have complied with the laws of the State of Wyoming.

3. That this Court grant such other relief as it may deem necessary, just and proper.

Respectfully submitted this 3rd day of October, 1986.

(Signed)
A.G. McClintock
Attorney General
Jennifer Hager
Assistant Attorney General
Dennis C. Cook
Assistant Attorney General
123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

PLAINTIFF'S ATTORNEYS

State of Wyoming)
) ss
County of Laramie)

George L. Christopulos, being duly sworn, deposes and says: he is the State Engineer for the State of Wyoming, the above named Plaintiff; he has read the foregoing complaint and the same is true to the best of his knowledge and belief.

(Signed)
George L. Christopulos

Subscribed and sworn to before me this 3rd day of October, 1986.

(Signed)
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

STATE OF WYOMING, ex rel., GEORGE L. CHRISTOPULOS, WYOMING STATE ENGINEER, Plaintiff, vs. UNITED STATES OF AMERICA; U.S. DEPARTMENT OF INTERIOR; U.S. BUREAU OF RECLAMATION, and DONALD PAUL HODEL, Secretary of the Interior; C. DALE DUVALL, Commissioner of Reclamation; BILL E. MARTIN, Regional Director, Missouri Basin Region, U.S. Bureau of Reclamation; DAVID G. WILDE, Project Manager, North Platte River Projects Office, U.S. Bureau of Reclamation; KENNETH C. RANDOLPH, Chief, Land and Water Operations Branch, North Platte River Projects Office, U.S. Bureau of Reclamation; WILLIAM McCRACKEN, Hydrologic Technician, Land and Water Operations Branch, North Platte River Projects Office, U.S. Bureau of Reclamation, in their official capacities, Defendants.	NO. C86-0370-B

ORDER STAYING PROCEEDINGS

This matter came before the Court on defendants' motion to dismiss or to stay the proceedings and on plaintiff's motion to remand the case to state district court. The Court, having heard the arguments of counsel, having reviewed the pleadings, and being fully advised in the premises, FINDS and ORDERS as follows:

This is an action to enjoin the United States, its agencies and officials from diverting water from the North Platte River at Whalen Diversion Dam in Wyoming and sending the water through the Interstate Canal for storage in Inland Lakes, Nebraska. The State of Wyoming also seeks to enjoin the defendants from diverting Wyoming water until the United States obtains permits required by Wyoming law. The complaint was filed in Wyoming District Court and removed to this Court.

The complaint alleges that the defendants administer the Reclamation Act of 1902, as amended, 43 U.S.C. §§ 371 *et seq*. Section 8 of that Act requires defendants to compiy with state water appropriation and diversion laws. The complaint consequently alleges that diversion of the North Platte River is unlawful absent a permit from the State Engineer. The State alleges jurisdiction under Wyo. Stat. § 41-2-111 (1977) and the McCarren Amendment, 43 U.S.C. § 666.

Related litigation is pending in the United States Supreme Court. The State of Nebraska was granted leave to file a petition in the Supreme Court for an order enforcing the Court's decree in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), apportioning the interstate flow of the North Platte River. Nebraska claims that Wyoming violated the decree by attempting to prevent the Bureau of Reclamation from diverting water in the North Platte River for storage in Nebraska.

The United States argues that the complaint must be dismissed. It first contends that the state court lacked jurisdiction, thus defeating this Court's jurisdiction on removal. *See Goodrich v. Burlington Northern R.R. Co.*, 701 F.2d 129 (10th Cir. 1983) (derivative nature of removal jurisdiction deprives federal courts of subject matter jurisdiction on removal where the state courts lacked jurisdiction). The second argument for dismissal is that the State of Nebraska is a necessary party which should be joined if feasible. Because joinder of the State of Nebraska is impossible, the United States urges that the action should be dismissed pursuant to Fed. R. Civ. P. 19(b). Each argument is flawed.

The McCarren Amendment confers concurrent jurisdiction on the federal and state courts. *Colorado River Conservation Dist. v. United States*, 424 U.S. 800, 809 (1976). The Amendment states in relevant part that:

> [c]onsent is hereby given to join the United States as a defendant in any suit . . . for the administration of such [water] rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under state law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit.

43 U.S.C. § 666(a)(2). The grant of concurrent jurisdiction thus empowers state courts to hear suits against the United States concerning the administration of water rights. *See, e.g., Gulf Offshore Co. v. Mobil Oil Co.*, 453 U.S. 473, 479 (1981) (mere grant of jurisdictoin to federal courts does not oust state courts from exercising concurrent jurisdiction); *Charles Dowd Box Co., Inc. v. Courtney*, 368 U.S. 502, 507-08 (1962) (concurrent jurisdiction permits state courts to enforce federal rights). This Court consequently obtained jurisdiction on removal.

The argument is premature that Nebraska is a necessary party which should be joined if feasible. In deciding whether to grant a motion to dismiss, the complaint must be read in the light most favorable to the opposing party. *Love v. Summit County*, 776 F.2d 908, 909 (10th Cir. 1985), *cert. denied*, 93 L.Ed.2d 25 (1986). A complaint should not be dismissed unless no set of facts would permit recovery. *Swanson v. Bixler*, 750 F.2d 810, 813 (10th Cir. 1984). All well-pleaded facts must be taken as true, and all reasonable inferences must be drawn in favor of the opposing party. *Id.* The State of Nebraska and irrigators within Nebraska appear to be necessary parties. This determination, however, cannot be made with certainty at this stage of the proceedings. Rule 19(b) requires consideration of plaintiff's interest in its chosen forum, defendants' right to avoid multiple lititgation and inconsistent judgments, the extent to which a judgment may impair the third party's ability to protect its interests, and the courts' interest in consistent and efficient adjudication. *Provident Bank v. Patterson*, 390 U.S. 102, 109-11 (1968). A proper evaluation of these factors cannot be conducted solely on the pleadings. Defendants' motion to dismiss must therefore be denied.

Denying the motion to dismiss does not, however, mandate a remand to the state courts. The defendant officials of the United States have a statutory right to remove the case to United States District Court. 28 U.S.C. § 1442(a). In addition, several factors must be examined in deciding whether a federal court should defer to the state courts. These include the convenience of the federal forum, the desirability of avoiding piecemeal litigation, which court first obtained jurisdiction, the stage of the proceedings, and the obligation of the federal courts to exercise their jurisdiction. *Colorado River Conservation District v. United States*, 424 U.S. at 817-20. *See also, Arizona v. San Carlos Indian Tribe*, 463 U.S. 545, 567-68 (affirming remand to state court).

Avoiding duplicative litigation is the overriding consideration in this case. Unlike the situations in *Colorado River Conservation District v. United States* and *Arizona v. San Carlos Indian Tribe*, this case does not involve complex litigation concerning the water rights of large numbers of claimants. In addition, the United States Supreme Court has assumed jurisdiction of a case raising similar issues between almost identical parties. Remanding the case would permit parallel proceedings in the state courts, thus increasing the potential for wasteful litigation and enhancing the danger of subjecting the parties to inconsistent judgments. These considerations apply with equal force to continuing the litigation in this Court. Until it becomes clear that the issues raised in this case are not in fact before the United States Supreme Court, the best alternative is to stay these proceedings pending a decision by the United States Supreme Court. A stay will not prejudice the rights of either party to this action and will better serve the interests of comity. It is therefore

ORDERED that the motion of the United States to stay the proceedings be, and the same hereby is, granted, and all further action in this case is stayed pending a determination of the issues by the United States Supreme Court or a showing that a resumption of the proceedings in this Court will not encroach upon the jurisdiction of the United States Supreme Court in the case between *Nebraska vs. Wyoming*, pending before it. It is further

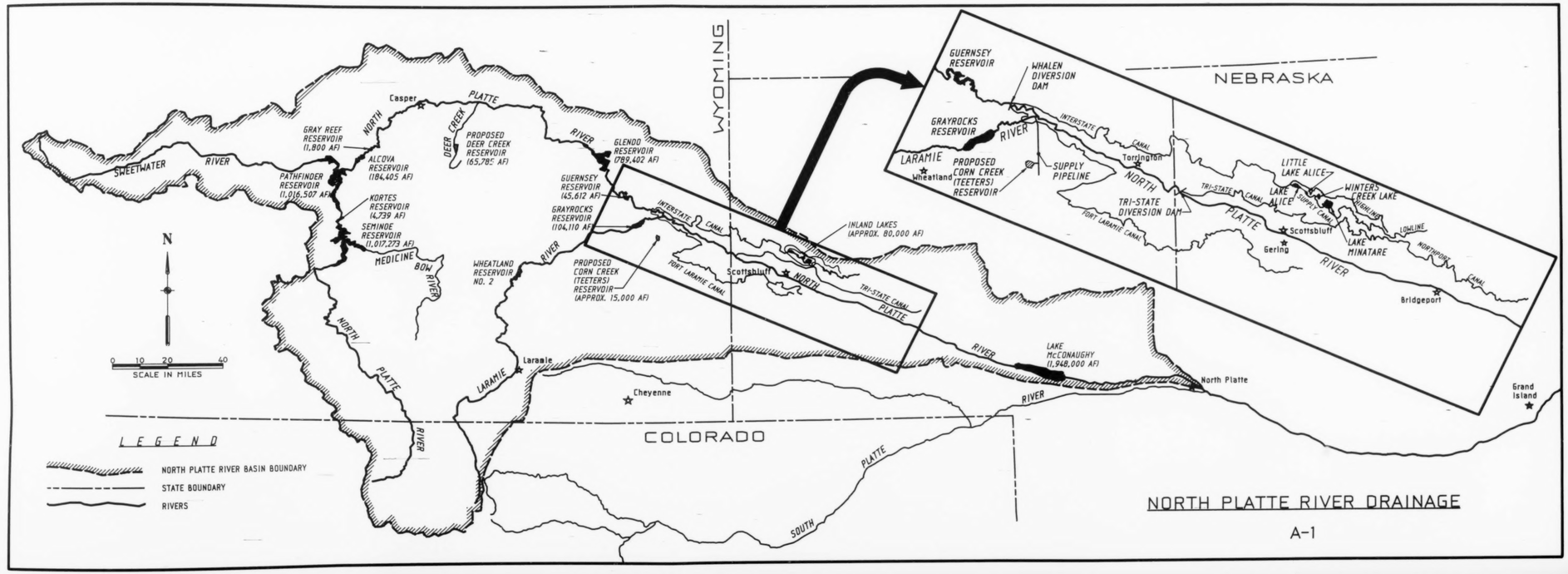
ORDERED that the motion of the United States to dismiss the complaint be, and the same hereby is, denied. It is further

ORDERED that the motion of the State of Wyoming to remand the proceedings be, and the same hereby is, denied.

Dated this 27th day of March, 1987.

/s/ Clarence A. Brimmer
CHIEF JUDGE
UNITED STATES DISTRICT
COURT

CERTIFIED A TRUE COPY:
William C. Beaman
Clerk
By (Signed)
Deputy Clerk



NORTH PLATTE RIVER DRAINAGE

A-1